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THE ENGLISH LIBEL CRISIS: A *SULLIVAN* APPELLATE REVIEW STANDARD IS NEEDED

I. INTRODUCTION

Recently, the landmark case in American libel law, *New York Times v. Sullivan*,[1] has fallen under sharp criticism. Once seen as a great victory for media defendants, *Sullivan* is now viewed by many commentators as having failed to justify reasons for its constitutionalizing libel law. By pointing to today's huge jury awards and the cost of defending libel actions, critics say that *Sullivan* has not cured the inhibiting effect of such costs upon the exercise of First Amendment freedoms.[2]

It is true that litigation costs and jury awards have increased considerably;[3] nonetheless, by constitutionalizing libel law, *Sullivan* has, arguably, succeeded in promoting "robust and wide-open debate"[4] on matters of public concern. This note suggests that *Sullivan* has succeeded to such an

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1. 376 U.S. 254 (1964). In this landmark case a unanimous United States Supreme Court reversed the Alabama Supreme Court, ruling that an advertisement placed in the *New York Times* by four black clergymen, which denounced the treatment of protesting black students and Dr. Martin Luther King, Jr. by police, was libelous *per se* because it contained inaccuracies and because, despite the language not mentioning the plaintiff police commissioner expressly, "criticism is usually attached to the official in complete control of the body." New York Times v. Sullivan, 144 So.2d 25, 39 (1962).

The Supreme Court ruled that holding media defendants strictly liable for defamatory statements is inconsistent with the First Amendment freedom of the press guarantees. In order to protect "the principle that debate on public issues should be uninhibited, robust, and wide open," *Sullivan*, 376 U.S. at 277, the Court in *Sullivan* held that public officials are prohibited from recovering damages for defamatory falsehoods pertaining to official conduct, except upon a showing that the false and defamatory statements were made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. More importantly for the purposes of this note, *Sullivan* recognized that there is "[a] need for appellate courts to make an independent examination of the entire record" in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 499 (1984); *see Sullivan*, 376 U.S. at 285.

2. *See generally* Henry R. Kaufman, *Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation, in* THE COST OF LIBEL 2 (1989); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

3. *See infra* notes 53, 54.

4. *Sullivan*, 376 U.S. at 280.

extent that its creation of an appellate review duty to protect freedom of speech and press should serve as a model to other countries, particularly England. Critics are often misled by the frequency of jury verdicts in favor of plaintiffs and the size of the damage awards. A large number of suits are weeded out in the pretrial motion stage by application of the *Sullivan* standard.[5] An overwhelmingly high percentage of verdicts in favor of plaintiffs are either reversed or the awards are reduced on appeal.[6] The *Sullivan* rationale and authority is most often used by appellate courts which places upon appellate courts a constitutional duty of independent review "that is not merely a question for the trier of fact."[7] In 1989, two cases, *Sutcliffe v. Pressdram Ltd.*[8] and *Aldington v. Tolstoy*,[9] dramatically illustrated England's rapidly escalating scale of jury damage awards in libel cases. As in the United States,[10] the call for English libel law reform is

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5. A recent study found that more than 60% of motions to dismiss were granted in libel actions brought by public official plaintiffs from 1976 to 1984, LEGAL DEFENSE RESEARCH CENTER BULL. NO. 16, 6 (1986) [hereinafter LDRC], and 75% of motions for summary judgment were granted in favor of the libel defendants. LDRC BULL. NO. 4, 2 (1982). *See generally* Floyd Abrams, *The Supreme Court Turns a New Page in Libel*, 70 A.B.A. J. 89 (1984).

6. Abrams, *supra* note 5.

7. Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 511 (1984).

8. [1990] 2 W.L.R. 271 (C.A.), 1 All E.R. 269. The court of appeal affirmed the lower court verdict of October 19, 1989. The jury had awarded £600,000 to Ms. Sonia Sutcliffe, the spouse of a convicted murderer known as the "Yorkshire Ripper," after a tabloid, *Private Eye*, mistakenly reported in three articles that Sutcliffe, finding herself married to a murderer, made a deal to sell her story to the *Daily Mail* for £250,000. *Id.* Sutcliffe, however, admitted that she had accepted £6000 towards legal fees for a separate copyright suit from a newspaper in return for an exclusive interview and also admitted receiving a £5000 loan in consideration of an option on her story, which was never written. Richard Shillito, *Libel Developments Viewed from the Trenches*, LAW SOC'Y GAZ., May 16, 1990, at 16. Furthermore, evidence of an additional £25,000 loan was not admitted upon appeal. Martin Mears, *The Libel Law: Life After* Sutcliffe *and* Aldington, 140 NEW L.J. 176 (1990). Sutcliffe claimed that the articles suggested that she had lied to police to provide her husband an alibi. *Id.* It is important to note that there were no punitive damages awarded in the verdict because there was no finding that the *Private Eye* knowingly published this falsehood. *Id.* The entire amount was considered "compensatory." *Id.* Although the appellate court did not reduce or modify the jury award, the case was sent back to the lower court on the issue of damages and was subsequently settled with court approval for £60,000. *Id.*

9. Aldington v. Tolstoy, Transp. Assoc. (Eng. C.A., July 19, 1990). The court of appeal affirmed the lower court award of £1.5 million to Lord Aldington because of false war crime allegations in 10,000 leaflets distributed at the university where he taught.

10. Numerous reforms to existing libel law have been proposed in the past few years. *See, e.g.*, Epstein, *supra* note 2, at 783-84; David A. Barrett, *Declaratory Judgments for*

increasing as fast as the jury awards.[11] English courts, however, unlike American courts, ultimately decide a high percentage of these libel suits in favor of the plaintiff.[12] Furthermore, because English libel law has a strict liability standard[13] and because there is no constitutional guarantee of free speech,[14] the English appellate courts must find a jury award to be wholly unreasonable in order to reverse or modify it.[15]

The successes of English libel plaintiffs in recent years have resulted in media defendants bearing the tremendous costs associated with defending the increasing number of libel suits.[16] The English press freedom has suffered "the chilling effect" from which Justice Brennan sought to spare the American press in *Sullivan*.[17] Unless dramatic changes are made in English libel law, this disturbing trend will continue to abridge English press freedom.

II. ENGLISH PRESS FREEDOM AND LIBEL LIABILITY STANDARDS

The English government has recently come under heavy criticism for its press restrictions.[18] These restrictions include the revised Official

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Libel: A Better Alternative, 74 CAL. L. REV. 846 (1986); Mark A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in Its Proper Place*, 101 HARV. L. REV. 1287 (1988).

11. *See, e.g.*, Martin Mears, *A Swallow can Make a Summer*, 139 NEW L.J. 741 (1989). Peter Carter-Ruck, one of Britain's most famous libel lawyers, has been one of the most outspoken critics of excessive damage awards, calling for the court of appeal to be given the power to alter libel damages awarded by juries. Cathy Jaskowiak, *Memoir of a Libel Lawyer– an Interview with Peter Carter-Ruck*, LAW SOC'Y GAZ., Feb. 20, 1991, at 28; *but see Leave Libel Award to the Jury*, 138 NEW L.J. 905 (1988).

12. *See generally* Shillito, *supra* note 8, at 16.

13. 28 HALSBURY'S LAWS, ¶ 1 (4th ed. 1979).

14. 8 HALSBURY'S LAWS, ¶ 834 (4th ed. 1979).

15. *Supra* note 13, ¶ 254. *See infra* note 112 for examples of the common tests applied.

16. T. G. Crone, *A Newspaper Lawyer's View*, LAW SOC'Y GAZ., Sept. 4, 1989, at 14.

17. *Id.*

18. Major international journalist organizations have attacked the British government for its control of the press. Peter Galliner, Director of the International Press Institute (IPI), described Britain as "the only blackspot in western Europe when it comes to freedom of the press," and went so far as to equate British press freedom with that of South Africa and Chile. *Press Freedom–Britain Classed with South Africa and Chile*, LAW SOC'Y GAZ., Apr. 12, 1989, at 4.

Secrets Act[19] and the ban on interviews with both the outlawed Irish

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Lord Prosser, the Scottish High Court Judge, recently speaking at the 1990 European City of Culture celebration, called for nations in the European Community to do away with "our repressive laws against freedom of expression," while particularly mentioning libel and obscenity laws. *Censorship in the Arts*, 140 NEW L.J. 1374 (1990).

Commenting on the press ban relating to the Irish Republican Army, *see infra* note 20, the Official Secrets Act of 1989, *see infra* note 19, and other Thatcher government restrictions related to criminal trials, American constitutional attorney Floyd Abrams says, "In toto, it's a frontal attack on civil liberties in the mother country." Craig Whitney, *Civil Liberties in Britain: Are They Under Siege?*, N.Y. TIMES, Nov. 1, 1988, at A18.

19. The Official Secrets Act of 1989, which repealed section 2 of the Official Secrets Act of 1911, became effective on March 1, 1990. David Newell & Catherine Courtney, *Media Law in 1989*, LAW SOC'Y GAZ., May 2, 1990, at 16. The 1989 Act makes it a criminal offense for a current or former member of British intelligence or security services to make any unauthorized disclosure related to his or her work. Whitney, *supra* note 18. The Act also creates criminal culpability for the publisher of such disclosure if, when made, there was reason to believe it would be damaging to national interests as broadly defined. *Id.* This enactment is in direct response to the British government's embarrassment over the "Spycatcher Affair." *See* Howell Raines, *Thatcher Uses Muscle to Retain Secrets Law*, N.Y. TIMES, Jan. 16, 1988, at 28, (where the government sought an injunction against three newspapers to prevent them from publishing excerpts from a book by Peter Wright, the former Assistant Director of Britain's Internal Security Service, as well as any material from any current or former member of the intelligence or security services). Barbara de Smith, *Broadcasting and Northern Ireland: Constitutional Issues?*, 139 NEW L.J. 1240 (1989) (citing Attorney General v. Guardian Newspapers Ltd., [1988] 3 W.L.R. 776). The highest British appeals court ultimately ruled that unless the government can prove such publishing would result in detriment to the public interest, no such injunction is warranted. *Id.* The court stated that the newspapers' appeals for press freedom were "of overwhelming weight" and publication would not further damage England's national security. *British Court Refuses "Spycatcher" Press Ban*, N.Y. TIMES, Feb. 11, 1988, at 32. Essential to this decision was the sentiment that because the book had been published in other countries. *See Australian Court Throws out British Move to Block Book*, N.Y. TIMES, June 2, 1988, at A9. Also, the book was widely circulated in England, further publication left no possibility of further damage to public interest. Whitney, *supra* note 18. However, the court "left little doubt that had Mr. Wright written the book in Britain, rather than Australia, it might never have seen the light of day." *Id. See also* Jennifer McDermott, *Secrets and the Public Interest*, 138 NEW L.J. 762 (1988); *British Court Refuses "Spycatcher" Press Ban*, N.Y TIMES, Feb. 11, 1988, at 32; *see Wrights, Wrongs and Press Freedom*, 138 NEW L.J. 757 (1988). *But see infra* note 143 and accompanying text (for a description of a newspaper's defeat in the latest court battle involving the "Spycatcher Affair").

Prime Minister Thatcher did not let the "Spycatcher" defeat quell her crusade against publication of former secret service agents' memoirs. The book *Inside Intelligence*, by Anthony Cavendish, was subjected to the same type of legal assault by the British government. Howell Raines, *British Government Seeking to Censor 2d Spy Book*, N.Y. TIMES, Jan. 10, 1988, at 10 [hereinafter *British Government*]; *see also* Albert Scardino, *British Bar Harper's on Spy Story*, N.Y. TIMES, Nov. 23, 1988, at A6. The battle to block

Republican Army and Sinn Fein.[20] Because the British Constitution is unwritten, English press freedom is incorporated into the common law right to freedom of expression.[21] Critics have cited the lack of definition of freedom of the press as the root of the crisis facing English press freedom.[22] Although there has been no official press censorship since 1622,[23] the press is subject to constraint by issuance of "D" notices[24] and, as shown above, by simple administrative notice. Without a written constitution, there is no limit on a government in control of Parliament, as was Prime Minister Thatcher's Conservative Party.[25] Critics urge that "Britons must recognize that the principle of freedom of information is based on the public's right to know" and recommend that this principle be given constitutional or legal protection.[26]

England's strict liability for libel is seen by media defendants as another restriction upon speech freedom.[27] An English plaintiff is under no obligation to explain his case except to show that the libelous words

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the book's publication was lost "because the Government had acknowledged that it was not a threat to national security." *Thatcher Loses Battle on Former Spy's Book*, N.Y. TIMES, July 9, 1989, at 14.

Thatcher's actions were met with tremendous criticism and her campaign against spy books "degenerated into an embarrassing vendetta and has made a mockery of press freedom in Britain." Raines, *supra*.

Of further concern to civil libertarians is the 1989 Act's elimination of the "public interest defense" provision of the 1911 Act, which precluded liability of disclosure to someone in the interests of the state. "In the absence of freedom of information legislation it is feared that the new Official Secrets Act will be used as an additional instrument with which to threaten legal action in order to regulate the dissemination of government information to the public." Newell & Courtney, *supra* note 19.

20. In October 1988, the Thatcher government, by administrative notice, barred British radio and television from broadcasting live or recorded interviews with members or supporters of the outlawed Irish Republican Army (I.R.A.) and with Sinn Fein, the legal political wing of the I.R.A. Whitney, *supra* note 18; Craig Whitney, *The Appeal of a British Bill of Rights*, N.Y. TIMES, Dec. 11, 1988, § 4, at 2.

21. 8 HALSBURY'S LAWS, *supra* note 14, ¶ 834.

22. Whitney, *supra* note 18.

23. 8 HALSBURY'S LAWS, *supra* note 14, ¶ 834.

24. *Id.* "D" notices are issued by the government, and in the name of national interest, request that certain material not be published. *Id.* Complaints about material published are investigated by the Press Council, and the offending publication may be censored. *Id.* ¶ 834 n.11.

25. Whitney, *supra* note 20.

26. *Press Freedom—Britain Classed with South Africa and Chile*, *supra* note 18 (summarizing a report from the International Federation of Journalists ("IFJ")).

27. Patricia Leopold, *Publish and be Sued?*, 138 NEW L.J. 613 (1988).

refer to him.[28] Once the plaintiff shows that the words defame him, the law presumes them to be false.[29] When the tort of libel has been committed, the law presumes damages.[30] Consequently, this approach allows juries to award substantial sums in compensation for the presumed harm to the plaintiff's reputation without proof of such harm.[31] The defendant has the burden of proving the truth of the words used as a defense.[32] While the defenses of "absolute" and "qualified" privilege do exist on the grounds of public policy,[33] such a privilege is rarely extended to media defendants.[34]

Because of English strict liability in libel cases, plaintiffs easily prevail at trial.[35] In fact, in 1989 only one case was tried and won by defendants and only after the judge removed it from the jury.[36] Indeed, libel plaintiff's easy victories in England have become apparent to the rest of the world. American news organizations that have international distribution are worried that libel suits will be filed in England to avoid the United States laws which protect the press by imposing a tougher burden of proof upon plaintiffs, such as that of *Sullivan*.[37] The former Prime Minister of

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28. 28 HALSBURY'S LAWS, *supra* note 13, ¶ 16.

29. *Id.*

30. 28 HALSBURY'S LAWS, *supra* note 13, ¶ 1.

31. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 795 (5th ed. 1984). This was also the approach taken by American courts before *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court held in *Gertz* that "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Id.* at 350.

32. 28 HALSBURY'S LAWS, *supra* note 13, ¶ 16; *see also* Shillito, *supra* note 8.

33. 28 HALSBURY'S LAWS, *supra* note 13, ¶ 3. An "absolute" privilege is a complete defense to both libel and slander proceedings. *Id.* Examples are words spoken by a judge or member of Parliament in the course of their capacity as such. A "qualified" privilege is extended on "certain occasions" to a person who while acting in good faith and without any improper motive makes a defamatory statement. *Id.* What qualifies as a "certain occasion" is not expressly defined, but, as a general rule, there must be a common and corresponding duty or interest between the parties making and receiving the communication. *Id.* ¶ 108. For an example of the court's standard argument for rejecting a media defendant's defense of qualified privilege, see *Blackshaw v. Lord*, [1983] 2 All E.R. 311.

34. *See Blackshaw*, 2 All E.R. 311.

35. Shillito, *supra* note 8.

36. *Id.* Although in 1990 two English defendants were actually victorious in the libel suits filed against them, a very large percentage of plaintiffs continued to prevail at trial; 87% in the year-end summary provided in Mr. Shillito's column. Richard Shillito, *Has Libel Lost its Way?*, LAW SOC'Y GAZ., Oct. 2, 1991, at 17.

37. Don J. DeBenedictis, *Moving Abroad: Libel Plaintiffs Say it's Easier Suing U.S.*

Greece, Andreas Papandreou, filed suit against *Time* magazine in England rather than in his homeland, where there is no civil cause of action for libel, or in the United States because "the English law of libel is much more favorable [to a plaintiff] than the American law of libel. The Prime Minister, as a public figure, would have a much harder go at it in the United States," said Leonard R. Boudin, Papandreou's American attorney.[38]

III. THE EFFECT OF *SULLIVAN* UPON AMERICAN PRESS FREEDOM AND LIBEL LIABILITY

Prior to the *Sullivan* decision in 1964, American courts were in agreement with the English standard that any libel was *per se* actionable; that is, damage was assumed from the "publication of the libel itself, without any evidence to show actual harm of any kind."[39] The unanimous Supreme Court in *Sullivan* dramatically changed United States libel law by establishing that state libel laws are limited by First Amendment principles.[40] The Court stated that there is no liability unless the defendant had "actual knowledge or disregard for the truth" regarding the libelous statement.[41] This standard is required to ensure that debate on public issues be "uninhibited, robust and wide open."[42]

Although the *Sullivan* doctrine applied only to public officials, the same First Amendment argument was used in *Curtis Publishing Co. v. Butts*[43] to extend the rule to public figures, and even to private plaintiffs in *Gertz v. Robert Welch, Inc.*,[44] when the Supreme Court held that "actual malice," as defined in *Sullivan*, was required to recover presumed or punitive damages against media defendants.[45] It is not completely

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Media Elsewhere, A.B.A. J., Sept. 1989, at 38.

38. *Id.* In *Packard v. Andricopoulos*, English courts awarded jurisdiction in a libel action against a Greek newspaper with an English circulation of only 50. Costas Douzinas et al., *It's All Greek to Me: Libel Law and the Freedom of the Press*, 137 NEW L.J. 609 (1987). Because Greek law treats libel as a criminal matter, punishable by a Dr 500 fine, the plaintiff escaped to the more friendly arms of the English legal system. *Id.* Oddly, *Halsbury's* states that the English courts have no jurisdiction where the local libel law does not permit a civil action. 8 HALSBURY'S LAWS, ¶ 619 (4th ed. 1979).

39. KEETON ET AL., *supra* note 31, § 112, at 795.

40. New York Times v. Sullivan, 376 U.S. 254 (1964).

41. *Id.* at 297.

42. *Id.* at 270.

43. 338 U.S. 130 (1967).

44. 418 U.S. 323 (1974).

45. "In short, the private defamation plaintiff who establishes liability under a less

clear whether American courts have extended to all persons the same constitutional privilege given to media defendants,[46] but the American Law Institute has determined that a requirement for recovery in any action for defamation is proof of harm to reputation and that such harm will not be presumed absent proof of the *Sullivan* "actual malice" standard.[47]

Sullivan was the first case to "link the changes in libel law to a new constitutional approach to free speech issues, one that supposedly broke away from the old legal formulas."[48] Justice Brennan's intention in requiring the "actual malice" proof was "to protect the press from intimidation or annihilation by money judgements."[49] By constitutionalizing libel law, *Sullivan* enlarged the role of the appellate courts by requiring them "to make an independent examination of the whole record . . . so as to assure ourselves that the judgement does not constitute a forbidden intrusion on the field of free expression."[50] As discussed in the following section, this duty is often used by an appellate court as a basis for reversal or reduction of jury awards that intrude upon free expression.

The *Sullivan* rule, however, does impose weighty duties upon the press. Due to the Court's shifting scrutiny toward the media defendant's conduct, the court's investigatory and editorial processes, as well as integrity, are often under attack.[51] Several commentators cite this critical attention as reason enough to declare that *Sullivan* has failed to achieve its goal.[52] However, such an imposition upon the editorial process should not be "chilling" to a media defendant, because "getting at the truth" justifies protecting the press from censorship. What are "chilling," however, are huge damage awards that bear no relation to any possible damage done by a libelous publication and the consequential costs to a media defendant who must spend incredible amounts of time and money[53]

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demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Id.* at 350.

46. KEETON ET AL., *supra* note 31, § 112, at 796.

47. RESTATEMENT (SECOND) OF TORTS § 621 (1965).

48. NORMAN L. ROSENBERG, PROTECTING THE BEST MAN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 243 (1986).

49. Leval, *supra* note 10, at 1289. Justice Brennan wrote: "The fear of damage awards . . . may be . . . inhibiting . . . . [W]hether or not a newspaper can survive a succession of such judgments, 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 . . . ." New York Times v. Sullivan, 376 U.S. 254, 277 (1964).

50. 376 U.S. at 285.

51. Leval, *supra* note 10, at 1287.

52. Kaufman, *supra* note 2; Epstein, *supra* note 2.

53. Several high-profile cases provide examples of the incredible cost of libel litigation.

fighting these unjustified jury awards.[54] If a newspaper consciously disregards the falsity of its statements, an award in favor of the plaintiff is justified. *Sullivan* properly gives the press the latitude to encourage inquiry into matters of public concern without allowing reckless journalism. An honest mistake will not subject a newspaper to liability, but an intentional attack without basis will.[55] This is the proper balance between the public's right to know and an individual's right to privacy. Unfortunately, English courts have not struck that same balance.

IV. WHY ENGLISH COURTS HAVE NOT ADOPTED A RULE TO PROTECT PRESS FREEDOM

The reason English courts have not changed from their common law strict liability approach to libel law to the American standard put forth by *Sullivan* and its progeny can be explained by the fact that some of the most basic American values are at odds with those of the English.

A free American press, despite its flaws, is seen as essential to the process of public debate and self-government. James Madison said that "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."[56] English public officials seem to regard the press as sensation-seeking unreliable pests that fail to provide a public service. "We don't have a great appreciation that however vile the free press often is, its vileness is necessary for the great purpose of vigilance that it serves in society," said Richard Shepherd, a Member of Parliament in the Conservative Party, explaining the lack of public debate on the government's proposed revision of the Official Secrets Act.[57]

See, e.g., Westmoreland v. CBS, 596 F. Supp. 1166 (S.D.N.Y. 1983), 601 F. Supp. 66 (S.D.N.Y. 1984), *aff'd*, 752 F.2d 16 (2d Cir. 1984) (combined costs exceeded $10 million before the case settled). *See A General Surrenders*, N.Y. TIMES, Feb. 19, 1985, at A22.

54. Even though the risk of ultimately losing a judgment after appellate review is slim (*see infra* part VI.), the costs associated with the protracted legal battle have forced publishers to rethink their approaches toward libel suits. *The Wall Street Journal*, which previously had a policy of refusing to settle any libel suit against it before trial, paid $800,000 to settle a suit in June, 1983. Anthony Abrams, *Annals of Law*, NEW YORKER, Nov. 5, 1984, at 52.

55. "Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the 'breathing space' that they need . . . to survive." New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964) (citing NAACP v. Button, 371 U.S. 415, 433 (1963) and Sweeney v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458 (1942), *cert. denied*, 317 U.S. 678 (1942)).

56. 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1836).

57. Whitney, *supra* note 18. For a further illustration of the polarity of values, compare

The state of the relationship between the English press and the judiciary has not gone unnoticed by legal commentators:

> The present depth of misunderstanding is sad. A free and fearless judiciary is a vital bulwark of a democratic society, and so is a free and fearless press. There is not a judge on the bench who would disagree . . . . [H]owever, misunderstanding and dislike of the press have led the courts on occasion into decisions which are unduly restrictive of press freedom.[58]

V. THE ESCALATING SCALE OF AMERICAN AND ENGLISH JURY AWARDS

The tort law of libel has developed in both the United States and England to serve three purposes: "(1) to *compensate* the plaintiff for the injury to his reputation, for his pecuniary losses, and his emotional distress, (2) to *vindicate* him and aid in restoring his reputation, and (3) to *punish* the defendant and dissuade him and others from publishing future defamatory statements."[59] Traditionally, the remedy employed to serve these purposes has been the award of money damages to the injured party;[60] however, the difficulty lies in determining an exact monetary figure.[61]

Additional trouble lies in the tendency of juries to award damages based not upon compensatory rationale, but solely to punish the wealthy media defendant.[62] The substantial damages awarded to the plaintiff, who brought an action merely to clear his name and be recompensed for his loss, are often a windfall to him.[63]

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the following excerpts from American and English judges: "Cases which impose liability on erroneous reports of political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors . . . . [T]he interest of the public here outweighs the interest of appellant or any other individual." Sweeney v. Patterson, 128 F.2d 457 (1942). (Judge Edgerton for a unanimous court affirming the dismissal of a congressman's libel suit based upon a newspapers charge of anti-Semitism).

"I would stress that I do not base this upon any balancing of public interest nor upon any considerations of freedom of the press . . . but simply on the view that all possible harm to the Crown has already been done . . . ." Attorney General v. Guardian Newspapers Ltd. 138 NEW L.J. 296 (1988).

58. Sir William Goodhart, *Hatred and Contempt—Judges and Journalists*, 140 NEW L.J. 787 (1990).

59. RESTATEMENT (SECOND) OF TORTS, *supra* note 47, § 623, at 326 (emphasis added).

60. *Id.*

61. *Id.*

62. *See generally* Mears, *supra* note 8.

63. An English legal commentator wrote in response to the three successive largest jury

A. English Jury Awards

To put into perspective the enormous increase in jury awards, the reader should note that the largest libel damage award to an individual before the £450,000 in *Packard v. Andricopoulos*,[64] in June 1987, was £100,000.[65] The *Packard* award was followed by £500,000 to Mr. Archer in July 1987,[66] then £600,000 to Ms. Sutcliffe in May 1989,[67] and ultimately £1.5 million to Lord Aldington in June 1989.[68] Incredibly, in only two years, the largest libel award increased 1400%.

What concerns free-press advocates is not the amounts of the awards, but rather that the figures seem "to bear little relation either to the seriousness of the defamation or to the extent of the publication."[69] The absence of any award, or even a claim for exemplary damages, in both

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awards (£500,000 awarded to a politician/author Jeffery Archer, for an attack on his sexual morality, *see* Shillito, *supra* note 8; £600,000 to Ms. Sutcliffe, *id.*, and £1.5 million to Lord Aldington for war crime allegations, *id.*), "[w]hen yet another litigant hits the legal jackpot, people do not say: 'How wonderful that justice has been done'. . . .[R]ather they envy the plaintiff in the same way they envy a pools winner, and at the same time are gratified that the despised press has been badly stung again." Mears, *supra* note 8.

64. *See* Douzinas et al., *supra* note 38.

65. *Id.*

66. *See* Shillito, *supra* note 8.

67. *See id.*

68. *See id.*

69. Crone, *supra* note 16. To further illustrate the unpredictability of jury awards, consider the following two cases. In one case, a jury awarded only £10,000 to a union negotiator that a newspaper falsely reported as drunk while on duty when in fact he suffered from a motor neuron disorder. *See id.* In the other case, Koo Stark was given £300,000 for a false report that she was having secret dates with her former boyfriend, Prince Andrew. Ms. Stark has recovered damages from newspapers on at least six occasions since her relationship with Prince Andrew ended in 1984. Francis Cowper, *Press Pays Dearly for "Right to Know,"* 200 N.Y. L.J. 2 (1988); *see also Koo's £300,000—a Sign of the Times*, 138 NEW L.J. 824 (1986). Under United States law, Ms. Stark would have a much tougher time recovering libel damages because she probably would be held to the "public figure" standard because of her voluntary connections with royalty. However, the question of when or whether a public figure can become a private figure is still not clearly answered in the United States. Also, it is possible that Ms. Stark would be kept from recovering if deemed "libel-proof" because previous libels or true events may have damaged her reputation to such an extent that no further damage could be done. KEETON ET AL., *supra* note 31, § 112, at 118 (Supp. 1990). *See generally*, Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985).

Packard[70] and *Sutcliffe*, are further evidence of misguided jury awards.[71] In those cases, the entire awards were supposedly compensatory in nature. This shows that juries are unable to separate their desire to punish deep-pocketed media defendants from their duty to compensate the plaintiff for his injury.

Several commentators and judges have realized that juries need better guidance from the courts.[72] They propose that the matter of damages be left completely in the hands of the judges, as done in Scotland.[73] However, since defamation law has developed to compensate injured plaintiffs for damage to their reputations in the eyes of their peers, "surely juries must be more in touch with everyday life than some members of the High Court bench who may not have travelled on a tube or turned past page four of the tabloids for some years."[74] Nevertheless, a well-known passage in support of allowing juries to determine damages points to the precise problem facing the English trial courts today, namely that court jury instructions do not give proper guidance: "I profoundly disagree with the suggestion that juries are constantly wrong on damages. If they are, *it is generally the fault of the judge who has failed to give them the help they need.*"[75] A solution for improving court guidance of the jury was expressed by L. Donaldson in the *Sutcliffe* appeal:[76]

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70. *See* Douzinas et al., *supra* note 38.

71. *See* Shillito, *supra* note 8.

72. Mears, *supra* note 8; *see infra* note 73; *but see* Evlynne Gilvarry, *Libel Juries*, LAW SOC'Y GAZ., Sept. 26, 1990, at 5 (While speaking at a Bar Conference, Charles Gray said that, despite the improved guidance to juries since Judge Donaldson's *Sutcliffe* opinion, jury difficulties "in accessing damages remain 'huge' and such improved guidance is 'an unsatisfactory compromise or half-way house.'"). *See also infra* note 73.

73. Mears, *supra* note 8. Lord Justice Donaldson's frustration with the current system of allowing juries, rather than judges, to assess damages, is apparent in the following passage from his opinion in *Sutcliffe*:

> As Parliament well knew, the approach of a jury to any assessment of damages is different from that adopted by judges. It is not for me to express any view on which is better, but they are different. Judges are trained, and bound by precedent, to have regard to awards made by other judges in similar cases. Juries are not . . . . Juries do not give reasons for their awards and it is the common experience of judges that having to give reasons is something which puts a substantial premium on ensuring that the head rules the heart.

Sutcliffe v. Pressman Ltd., [1990] 2 W.L.R. 271 (C.A.), 1 All E.R. 269, 287.

74. Mears, *supra* note 11, at 741.

75. Broome v. Cassell & Co., [1971] 2 All E.R. 187, [1971] 2 Q.B. 354, 399 (emphasis added).

76. *See* Shillito, *supra* note 8. An appeal was sought by the defendant in *Private Eye*

> What I think is required is some guidance to juries in terms which will assist them to appreciate the real value of large sums .... [T]he judge could ... properly invite them to consider what the result would be in terms of weekly, monthly or annual income if the money were invested ... in an account without touching the capital of the sum awarded ....[77]

The court noted that the £600,000 award to Ms. Sutcliffe, if invested in such a way, would yield £1000 weekly.[78]

However, despite these suggestions, the result of the *Sullivan* appeal is that a judge in a libel case *cannot* offer guidance on the actual amount of the award to be given, and neither counsel is allowed to refer to awards in other libel cases to provide guidelines for the jury.[79] When one considers the reluctance of English appellate courts to disrupt jury awards,[80] allowing greater guidance by the trial court judge makes sense. The trial court could cut down the instances in which the appellate courts are confronted with the excessive award issue, while still keeping the award process in the hands of the jury.

B. American Jury Awards

A strong case can be made that the sizes of jury awards in the United States are more out of line than their English counterparts. However, in the wake of *Sullivan* and its progeny, an American jury's verdict and subsequent damage award in a libel case is much less indicative of the eventual outcome of the dispute[81] than is an English jury's determination.

While Justice Brennan's intention in requiring evidence of "actual malice" in *Sullivan* may have been to protect the press from the debilitating

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on the grounds of excessive award, the judge's misdirection to the jury, and the discovery of new evidence regarding the £25,000 loan. *Id.* A new trial was ordered on the issue of damages only. The suit was eventually settled with court approval for £60,000. *Id.*

77. *Id.*

78. However, it has been asked sarcastically that "[i]f a jury did not consider £600,000 an excessive amount, how would they think £1,000 a week would be exorbitant?" P.R. Ghandi, *No End to the Libel Roulette*, LAW SOC'Y GAZ., Dec. 6, 1989, at 19.

79. Mears, *supra* note 8.

80. *See infra* part VI.

81. *See infra* part VI., for an overview of United States appellate court trends.

effects of large damage awards,[82] the damage awards by juries have, nonetheless, increased rapidly. Recent libel awards have surpassed those in medical malpractice and product liability cases. A 1983 study showed that the average award of the eighty libel suits studied was $2,174,633, whereas the awards in product liability and malpractice averaged *only* $785,671 and $665,774, respectively.[83] The same study also showed that libel plaintiffs won eighty-three percent of cases that went to jury trial, compared to thirty-three percent for medical malpractice and thirty-nine percent for product liability trials.[84] The Libel Defense Resource Center ("LDRC") chairman, who was also General Counsel for Time, Inc., said at the time:

> [T]he . . . data . . . suggest[s] that the principles of *Sullivan* . . . are no longer being applied to safeguard "robust" media coverage of events of public interest . . . . As a society characterized by freedom of speech and free press, we must do more in the years ahead to regain control over the tidal wave of unjustified and disproportionate judgments.[85]

Something appears very wrong when the awards in cases not involving physical injuries are three times those in which death resulted.

In April 1991, a Texas jury awarded a former District Attorney $58 million in the largest libel damage award in United States history. A Dallas television station was found to have recklessly defamed the plaintiff by wrongfully accusing him of taking payoffs in drunken driving cases.[86] Some examples of other examples of "mega-verdicts" include: *Guccione v. Hustler Magazine, Inc.* ($40,300,000 award at trial; case reversed and remanded);[87] *Pring v. Penthouse International, Ltd.* ($26,500,000 award; trial judge cut punitive damages in half; the Tenth Circuit set the award

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82. *See* Leval, *supra* note 10.

83. LDRC BULL., No.9, Winter 1983 (from William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 243 n.110 (1984)).

84. *Id.*

85. *Libel Juries Harsh: Appeals Courts Mild*, 70 A.B.A. J. 27 (1984).

86. *$58 Million Awarded in Biggest Libel Verdict*, N.Y. TIMES, Apr. 21, 1991, at L19. The award is being appealed. *Id.* The jury rejected the defense's argument that the news report was fair comment on the performance of a public official because it was made in reliance upon a federal investigation which ultimately led to the indictment of the plaintiff. *Id.*

87. 7 Med. L. Rptr. 2077 (Ohio Ct. App. 1981).

aside);[88] and *Newton v. NBC* (jury award totalling $22,500,000 reversed and judgment entered for NBC).[89] If these huge jury awards were sustained on appeal, they certainly would constitute a tremendous threat to the media defendant's desire to undertake risky or controversial investigations and quite possibly threaten the publications very existence.[90]

More illustrative of the actual plaintiff success rate is a study that tracked 164 libel plaintiffs through the very end of the legal process;[91] in the end, after appeal, only thirteen of the original 164 ultimately "won" their cases with an average award of $80,000.[92] The average settlement was only $7,000, which does not reflect reduction for fees or costs. Therefore, not counting settlements or reversals, the plaintiff success rate was less than ten percent.[93] Although academic study and public awareness of defamation law is at an all-time high and the number of suits brought by high profile public figures is increasing,[94] the total number of suits "dropped precipitously after 1982, due in part to changes in the way libel suits are processed in the courts."[95] Indeed, as trial courts begin to apply strictly the "actual malice" test put forth by *Sullivan*[96] and *Butts*[97] for public officials and figures and the *Gertz* requirement of a minimum of negligence for private plaintiffs, the percentage of libel suits will

88. 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

89. 930 F.2d 662 (9th Cir. 1990).

90. In one case, the media defendant was forced to declare bankruptcy after losing a $9.2 million award. Green v. Alton Telegraph Printing Co., 438 N.E.2d 203 (1982); *see* Kupferberg, *Libel Fever*, 20 COLUM. JOURNALISM REV., No. 3, at 36 (1981). Smaller publications with limited budgets find their editorial policies dramatically altered by the fear of encountering the costs of libel actions. Gregory L. Stock, editor of the *Jeannette Spirit*, a weekly publication with 2000 circulation, says that the steps his publication has taken to avoid being sued, include declining to publish several letters to the editor for fears of libel action, refraining from writing editorials on several subjects of regional and timely importance for fear of legal reprisals, refraining from investigative reporting, and not welcoming any information of corruption, malfeasance, and related matters. Eugene L. Roberts Jr., *A Good Time to Get out of Journalism?*, PHILA. MAG., Sept. 1990, at 77.

91. Randall P. Bezanson, *The Libel Suit in Retrospect: What the Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 791 (1986).

92. *Id.*

93. *Id.*

94. LDRC BULL., NO. 16, 1, Winter 1986. *See generally* Bob Brewin & Sydney Shaw, *Libel Law Then and Now: A Review Essay*, 1989 WIS. L. REV. 359 (overview of recent trends in American libel law).

95. Brewin & Shaw, *supra* note 94.

96. 376 U.S. 254 (1964).

97. 388 U.S. 130 (1967).

continue to drop. An LDRC study shows that seventy-five percent of defendants' motions for summary judgement prevail, usually because the plaintiff cannot meet the *Sullivan* standard.[98]

VI. COMPARISON OF AMERICAN AND ENGLISH APPELLATE REVIEW STANDARDS

On August 30, 1990, the United States Court of Appeals for the Ninth Circuit reversed one of the largest damage awards in American libel history, $22.5 million, in *Newton v. NBC*.[99] The opinion in this case provides a good example of how the *Sullivan* doctrine of independent review allows appellate courts to set aside jury verdicts, which it feels will impinge upon First Amendment freedoms. In the years since *Sullivan* was decided, defendants have won seventy percent of their appeals. Because the reversal rate of all civil cases in federal appellate courts is just nineteen percent, a seventy percent reversal rate "is startling."[100]

Newton was brought in 1981 by Wayne Newton after the National Broadcasting Company ran three stories about a federal investigation of the celebrity performer's possible Mafia connections. The suit alleged that the broadcasts "either falsely stated or conveyed the false impression that the Mafia helped Newton buy the Aladdin in exchange for a hidden share of the hotel/casino ownership and that he had lied under oath to Nevada gaming authorities."[101] The district court jury awarded Newton $19 million in compensatory and punitive damages plus another $3.5 million in interest. The district court judge set aside the $9,046,750 award for lost wages and the $5 million for damaged reputation and entered judgment against NBC for $5,275,000.

Because Newton is, admittedly, a "public figure," he was required to "prove at trial by clear and convincing evidence that NBC and its journalists made false, disparaging statements with 'actual malice.'"[102] Actual malice has consistently been held provable by evidence "that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement."[103] The Ninth Circuit assumed the statements to be false and considered the issue of

98. Abrams, *supra* note 5.

99. *See supra* note 89 and accompanying text.

100. Abrams, *supra* note 5.

101. Newton v. NBC, 930 F.2d 662, 667 (9th Cir. 1990).

102. *Id.* at 673.

103. Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 511 n.30 (1984).

"actual malice," which it found Newton failed to prove with the required "convincing clarity."[104]

The court recognized that it must carefully balance its *Sullivan* duty of appellate "review in order to preserve the precious liberties established and ordained by the Constitution"[105] with the federal rules of procedure, which mandate that findings of fact shall not be set aside unless clearly erroneous.[106] By applying this balancing test, the court concluded that, "although we generally review all purely factual findings for clear error, when we review evidence on the dispositive Constitutional issue of actual malice, we are required to be more discriminating in our deference."[107]

The court also noted that, like *Sullivan* years before it, this case "poses the danger that 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 hero."[108] Because United States courts have recognized that large damage awards can encroach upon the freedom of the press and that sometimes a jury will not be able to focus on the larger constitutional issue, they have, in *Sullivan*, created a legal doctrine that requires appellate courts to review lower court decisions to ensure the precious right of speech and press freedom.[109]

The English standard of appellate review is quite different from that in the United States. The Court of Appeal will rarely interfere with the jury's verdict on grounds that it is excessive or inadequate.[110] The Court interferes only if it seems that the jury has been guilty of misconduct or has made a "gross blunder."[111] Several tests have been put forth to determine what would be a jury blunder worthy of reversal, but all are virtually impossible to attain.[112] In fact, since 1964,[113] no jury awards

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104. *Newton*, 930 F.2d at 720.

105. *Id.* at 675.

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

107. Newton v. NBC, 930 F.2d 662, 680 (9th Cir. 1990).

108. *Id.* at 682-83.

109. *Id.*

110. 28 HALSBURY'S LAWS, *supra* note 13, ¶ 244; Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., [1934] 50 T.L.R. 581, 585.

111. 28 HALSBURY'S LAWS, *supra* note 13, ¶ 254.

112. *Id.* Commonly applied tests are "damages are not so large that no twelve reasonable people could reasonably have given them," *id.* ¶ 254, and "no reasonable proportion exists between the amount awarded and the circumstances of the case." *Id.*

113. McCarey v. Associated Newspapers, Ltd., [1964] 3 All E.R. 947, [1965] 2 Q.B. 86.

in libel actions have been reduced by the Court of Appeal, and only one case has been remanded to a lower court on the issue of damages.[114] It is so rare that an appellate court interferes with a jury award, one judge lamented that "[w]e still have the power to reduce an excessive award, but can we ever exercise it . . . ?"[115]

The major difference between English and American appellate review policies lies in the English fervent refusal to overturn any jury award, while such reversal is very common in the United States. The magnitude of United States jury verdicts, such as those in *Newton*,[116] *Guccione*,[117] and *Pring*,[118] "[h]ave given impetus to movement for 'reform' of libel law, while the law itself has increasingly moved in the direction of appellate supercession of the jury."[119] However, as the call for reform heightens in England, the law has stood mute. The reasoning seems to be that because English libel law is based in common law, as is the freedom of expression, and the government has refused to guarantee such freedoms in constitutional or statutory form, the courts are reluctant to become involved in protecting speech freedoms. They feel that these decisions are best left to the jury. The United States, however, has adopted a more liberal attitude toward appellate review when the matter contested has its origin in the Constitution.

VII. POTENTIAL CHILLING EFFECTS OF CONTINUED LARGE DAMAGE AWARDS UPON ENGLISH PRESS FREEDOMS AND POSSIBLE SOLUTIONS

The obvious social cost of libel damage awards is the chilling effect on the press, which could lead to a reduction in investigative reporting and reduced coverage of controversial issues and personalities.[120] Transaction costs are another consideration in libel cases. This is especially true when

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114. Riches v. News Group Newspapers, Ltd., [1985] 2 All E.R. 845, [1986] 1 Q.B. 256.

115. Blackshaw v. Lord, [1983] 3 W.L.R. 283, [1983] 2 All E.R. 311, [1984] 1 Q.B. 1., *quoting* L. J. Stephenson.

116. Newton v. NBC, 930 F.2d 662 (9th Cir. 1990).

117. Guccione v. Hustler Magazine, Inc., 7 Med. L. Rptr. 2077 (Ohio Ct. App. 1981).

118. Pring v. Penthouse Int'l, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

119. SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS" 156 (1988).

120. Barrett, *supra* note 10, at 861; *see supra* note 90 (for an example of these chilling effects).

a jury damage award is very high and the media defendant is forced to defend itself through the very last appeal.[121] While, in all probability, the American media defendant will ultimately prevail by winning a reversal or substantial reduction at the appellate level, the victory may still cost millions of dollars in legal expenses and lost productivity.[122] More dangerously, a similar English media defendant may avoid these litigation costs by abandoning investigative or controversial reporting altogether.[123] A third, less obvious, cost manifests itself "in the form of public cynicism regarding press accuracy."[124] This would seem to be especially true in England, where respect for the press is lacking.[125]

Several solutions to the libel law dilemma have been proposed by reform advocates, including: improved court guidance of juries,[126] a "Right to Reply Bill,"[127] the use of personal injury case procedure in which the jury decides the issue of liability and the judge determines damages,[128] and a Bill of Rights to ensure various common law freedoms.[129] However, many of these solutions have been previously put before Parliament by the Faulk's Committee in 1975, and in other proposals, but to no avail.[130]

In light of the clear message from Parliament that damages shall be assessed by juries in libel actions,[131] any move to reform English libel law must be made by the judiciary. Some argue that the reasons given for

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121. *See supra* notes 53-54.

122. *Id.*

123. *See supra* notes 57-58 and accompanying text. This sentiment was also expressed by Professor Eric Barendt in his inaugural lecture as Goodman Professor of Media Law in England:

> [H]e suspected there might be [a] 'chilling effect' of the law on editors who reasonably believed a story on a matter of public interest was true and were not confident of being able to persuade a jury of its truth. He said it should be urgently considered whether the law should be reformed to change the onus of proof in libel actions and extend the law of privilege relating to the press to counteract any such chilling effect.

Shillito, *supra* note 36.

124. Barrett, *supra* note 10.

125. *See* Whitney, *supra* note 18.

126. Shillito, *supra* note 8; *see supra* note 76 and accompanying text.

127. *Reforming the Press, Step by Step*, 139 NEW L.J. 245 (1989).

128. *Libel Law Under Review*, LAW SOC'Y GAZ., May 31, 1989, at 3.

129. Whitney, *supra* note 20.

130. Mears, *supra* note 11, at 741.

131. Supreme Court Act, 1981, § 69 (Eng.).

not enacting the European Convention on Human Rights, which was signed by England in 1950 and guaranteed press and speech freedoms, are now questionable.[132] Instead of feeling, as argued at the time, that such a formal declaration, like the United States Constitution, was not needed to ensure freedoms protected in common law, people now are "wary . . . that [the] courts have lost their feel for being a check on government actions, and that there really aren't any others"[133] in the absence of a written declaration.[134]

The logical answer to these problems is a "*Sullivan*-like" standard of appellate review, which recognizes that speech and press freedoms are so entrenched in the common law that they must be protected from any damage award that will unduly burden their future use.

VIII. RECENT DEVELOPMENTS

Responding to the mounting criticism of English defamation law, and the *Aldington*[135] and *Sutcliffe*[136] jury awards in particular, the Thatcher government proposed reform measures.[137] The central proposal explicitly empowers the court of appeal to substitute its own damages award when

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132. Whitney, *supra* note 18.

133. *Id.* (quoting Richard Shepherd, an openly critical Conservative Party member of Parliament).

134. *Id.*

135. *See supra* note 9.

136. *See supra* note 8.

137. *Libel Law Reforms*, LAW SOC'Y GAZ., Feb. 23, 1990, at 234. The proposals are delineated in section 8 of the *Courts and Legal Services Act* of 1990, which took effect January 1, 1991. Shillito, *supra* note 36. Of course, there are those who are quick to point out perceived flaws in this reform:

> It is too soon to judge the impact of this important reform but, on the face of it, it very much undermines the position of the jury. If jury awards are regularly replaced by a superior court which has not even heard the witnesses give evidence, it will raise the question whether any real function remains for the jury in libel actions.

Id.

Nonetheless, should the reviewing court confine its scrutiny solely to the issue of damages and their effect, if any, upon individual and media freedoms of expression, it seems that a great need for juries continues in deciding the ultimate issue, liability. *See New Powers for Court of Appeal in Libel Cases*, LAW SOC'Y GAZ., Feb. 21, 1990, at 4. *See infra* note 142 and accompanying text.

it believes that the jury's award is excessive or inadequate.[138] While the court has never been expressly prohibited from altering jury awards, it has not done so since the *McCarey* case in 1964.[139] Although guidelines have not been put forth for the procedures or goals of this reforming measure, the consensus is that the results will weigh heavily in favor of the libel defendant.[140] Lord Mackay, as Lord Chancellor, proposed that the court should decide how to exercise its new powers, leaving the role of the jury intact.[141] One hopes that the rationale given for allowing modification of jury awards will recognize the direct impact of increasing awards on the public's exercise of its speech freedoms.[142]

However, a recent court decision indicates that the English courts are not yet willing to interpret the government's reform talk as an indication that speech and press freedoms should be broadened. In early April 1991, the House of Lords upheld a contempt ruling against *The Sunday Times* and its editor for publishing material from the book *Spycatcher*[143] while under a gag order.[144] "This judgment has very serious implications for freedom of the press in this country. It enables a blanket gag to be imposed on the media, preventing publication of information even when it is in the public interest," said a *Sunday Times* spokesperson.[145] The court seems to have regressed from its position in *Attorney General v. Guardian Newspapers Ltd.*, in which the House of Lords denied the government's request for an injunction to prevent publication of *Spycatcher* excerpts because the government could not prove that such publication was against the public interest.[146]

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138. *New Powers for the Court of Appeals in Libel Cases, supra* note 137.

139. McCarey v. Associated Newspapers, Ltd., [1964] 3 All E.R. 947, [1965] 2 Q.B. 86.

140. *New Powers for the Court of Appeals in Libel Cases, supra* note 137.

141. *Libel Law Reforms, supra* note 137.

142. Indeed, there is some evidence that the trend of a more liberating view toward libel liability is growing. The Lord Chancellor issued a consultation paper on making the defense of innocent dissemination available to printers due to the rapid development of printing technology and because a printer "need not familiarize himself with the content of the article as does the author and the professional publisher." *New Defence for Printers?*, 140 NEW L.J. 1178 (1990).

143. *See supra* note 19 (for a discussion of the "Spycatcher Affair").

144. *'Spycatcher' Contempt Upheld*, CHI. DAILY L. BULL., Apr. 11, 1991, at 1.

145. *Id.* The spokesperson added that the newspaper would appeal this ruling to the European Court of Human Rights. *Id.*

146. *See supra* note 19.

IX. CONCLUSION

Rapidly increasing jury awards are further compromising the speech freedoms of the English people, which are already under attack by the various restrictive enactments of the Thatcher government.[147] Although developments in early 1990 revealed that the Thatcher government was willing to give the judiciary the power to take control of the damage award process, there has been no indication that the government of Prime Minister John Major will follow through with the reform proposals. In fact, by recently upholding the contempt ruling against the publisher of the *Spycatcher* excerpts, the English courts have indicated that they do not interpret the government's damage award reform talk as a sign that the government wants them to broaden speech freedoms. Consequently, the time has come for the English courts to issue a landmark legal precedent, as the United States Supreme Court did in 1964 with their opinion in *New York Times v. Sullivan*.[148] Such a precedent should hold that the English common law right of free expression is so fundamental to its citizens that libel damage awards that unjustly infringe upon the enjoyment of this right will *not* go unchecked by the appellate courts.

Only after such a step is taken will the press and the public be able to properly participate in the arena of public debate, which is critical to the development of a democratic society.

Sean Thomas Prosser

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147. *See supra* notes 18-20 and accompanying text.

148. 376 U.S. 254 (1964).