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First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages

Robert D. Sack*
Richard J. Tofel**

I. Introduction

There seems to be increasing sentiment that the time for a sea change has come in the law of libel; sometimes it appears that *any* sea change will do. Thus commentators, practitioners and even legislators are proposing global solutions to the libel problems of the day. Some would have us heed their rising voices against what they consider overprotection of the press under the constitutional libel law doctrine of the past 22 years.[1] Critics from another quarter would grant constitutional immunity to what they view as the modern equivalent of "seditious libel".[2] Some would create new kinds of libel actions;[3] still others would consider these and other proposals for reform.[4] Media critics contend that standards of liability are simply too high and result, ultimately, in a reckless press. From the press perspective, the causes of distress and discontent behind the cry for change stem primarily from the immense cost and increasing risk of defending libel suits.

Undoubtedly, in some instances costs have become overwhelm-

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1. *See, e.g.*, Cain, *Protect Us From a Reckless Press*, 71 A.B.A. J., July 1985, at 38. *Cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2950-53 (1985) (White, J., concurring).

2. Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 606-07 (1983).

3. *See* Congressman Schumer's proposal, H.R. 2846, 99th Cong., 1st Sess. (1985). *See also, Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U. L. REV. 375 (1981). The Schumer bill would create a federal declaratory judgment action of truth, available at the defendant's option. The bill would also establish a uniform national statute of limitations of one year for defamation, would forbid punitive damages, and would freely grant attorneys' fees, at least to successful defendants. *See also, Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U. L. REV. 375 (1981).

4. *See* Abrams, *Why We Should Change the Libel Laws*, N.Y. Times, Sept. 29, 1985 § 6 (Magazine), at 34;; Brill, *Redoing Libel Law*, AM. LAW., Sept. 1984, at 1; Franklin, *Good Names and Bad Law: A Critique of Libel Laws and a Proposal*, 18 U.S.F. L. REV. 1 (1983).

ing, both in economic and editorial terms. Editorially, one recent inquiry found four daily newspapers, two weeklies and a nationally syndicated columnist who admitted that they had become less aggressive in the pursuit of certain stories because of libel problems.[5] There are certainly many more who are intimidated but unwilling to admit their intimidation, who haven't been asked, or on whom the intimidating effect simply has not been recognized.

A recent two-part *Los Angeles Times* story about a libel case against the *Fresno* [California] *Bee* reported that

> Bee editors say the paper's special investigative team has been forced to spend so much time and energy in pretrial preparation for this case [and for several other libel suits . . .] that the team has been disbanded, its four-year investigation of official corruption and organized crime in Fresno has been suspended — perhaps permanently — and the lead reporter on the team [Pulitzer Prize winner Denny Walsh] has, in effect, become a full-time litigator; he hasn't written a story on anything for almost two years.[6]

Other tales also reflect the anguish and distraction engendered by the defense of libel actions.[7]

Economically, expenditures for defense can be huge. Estimates of the legal cost of defending General William Westmoreland's suit against CBS run as high as $8,000,000; for Ariel Sharon's suit against *Time* the guesses go as high as $7,000,000.[8] One Congressman has estimated that the *average* cost of defending a libel action is now $150,000.[9]

The risks of libel judgments are apparent in an age of mind-boggling libel awards. The libel "megaverdict," a judgment of $1,000,000 or more, was virtually unheard of[10] until the 1980's. It has become commonplace.[11]

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5. *See* Massing, *The libel chill: how cold is it out there?*, COLUM. JOURNALISM REV., May-June 1985, at 31.

6. Shaw, *An Ominous Case Moves Near Trial*, Los Angeles Times, Oct. 30, 1985 at 1, col. 1. The libel case, Kashian v. McClatchy Newspapers, No. 284307-6, slip. op. (Cal. Super. Ct., Fresno Co.), has since been settled without the payment of any money.

7. *See, e.g.*, Magnusson, *How I Lost My Libel Case*, WJR, Nov. 1985, at 12-16.

8. Baer, *Insurers to Libel Defense Counsel: 'The Party's Over'*, AM. LAW., Nov. 1985, at 69. As a result of skyrocketing defense costs, insurance costs have also escalated to dangerous levels. *Id.*; *see also* Massing, *Libel insurance: Scrambling for cover*, COLUM. JOURNALISM REV., Jan.-Feb. 1986, at 35. The resultant "chilling effect" can thus be either direct, through increased costs of litigation, or indirect, through higher premiums for insurance to guard against the risk either of liability or legal fees.

9. Baer, *supra* note 8, at 69 (quoting Rep. Schumer).

10. The exception was the 1962 verdict awarding $3,500,000 to former broadcaster John Henry Faulk in Faulk v. Aware, Inc., 19 A.D.2d 464, 470-71, 244 N.Y.S.2d 259 (1963), *aff'd*, 14 N.Y.2d 899, 200 N.E.2d 778, 252 N.Y.S.2d 95 (1964), *cert. denied*, 380 U.S. 916 (1965). It was later reduced by the Appellate Division to $450,000.

11. *See "Megaverdicts Here to Stay," Lawyer Warns Editors*, EDITOR & PUBLISHER,

According to the Libel Defense Resource Center, a media-sponsored source of statistics on the subject, while only one pre-1980 libel award exceeded $1,000,000,[12] fully sixty percent of the 1983 jury awards surpassed that figure.[13] In the 1980-83 period, excluding three eight-figure verdicts against *Penthouse* and *Hustler* magazines,[14] the average initial libel award was $871,891.[15] The gasp with which the press reacted to the 1982 $2,000,000 verdict in *Tavoulareas v. Piro*[16] has given way to a series of sighs as reports of million-dollar-plus awards have become routine.[17]

Thus, the sweeping changes being proposed for the law of libel are useful, if only as a focus for discussion of increasingly troubling developments in the area.[18] But any progress that may be made in that endeavor, if progress it be, surely will be slow. Calls for broad reform ought not to obscure the immediate danger of elephantine verdicts, a problem that may readily be addressed by jurisprudence already at hand. Indeed, the process of coming to grips with these

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May 8, 1982, at 11; Kupferberg, *Libel Fever*, COLUM. JOURNALISM REV., Sept.-Oct., 1981, at 36. Early "megaverdicts" (most of them reduced or settled for a lower amount) included the $40,300,000 verdict in Guccione v. Hustler Magazine, Inc., No. 80AP-375 (Ohio Ct. App. Oct. 8, 1981), *cert. denied*, 459 U.S. 826 (1982); $26,000,000 in Pring v. Penthouse, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); $9,200,000 in Green v. Alton Telegraph Printing Co., 107 Ill. App.3d 755, 438 N.E.2d 203 (1982); $4,500,000 in the 1981 trial in McCoy v. Hearst Corp., 174 Cal. App. 3d 892, 220 Cal. Rptr. 848 (1985); and $1,600,000 in Burnett v. National Enquirer, 7 MEDIA L. RPTR. (BNA) 1321 (Cal. Super. Ct. 1981), *modified*, 144 Cal. App.3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984).

12. *See supra* note 10.

13. Bulletin No. 9 at 27 (1984) Libel Defense Resource Center [hereinafter cited as LDRC].

14. The cases were Guccione v. Hustler Magazine, Inc., No. 80AP-375 (Ohio Ct. App. 1981) (jury awards of $3.3 million compensatory damages and $37 million punitive damages, remitted to $2.3 million compensatory and $2.85 million punitive damages); Lerman v. Flynt Distributing Co., 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985) (jury award of $7 million compensatory damages and $33 million punitive damages, the latter reduced to $3 million by trial court; reversed on the law, but damages denounced by the Court of Appeals as grossly excessive); and Pring v. Penthouse, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

15. LDRC Bulletin No. 9, *supra* note 13. LDRC has also noted a trend toward a two-tier system of judgments: either below $100,000 or above $1,000,000. LDRC Bulletin No. 11 at 12 (1984).

16. 567 F. Supp. 651, 652 (D.D.C. 1983), *rev'd in part*, 759 F.2d 90 (1983), *panel reh'g denied*, 763 F.2d 1472, (D.C. Cir. 1985), *vacated for reh'g en banc*, 763 F.2d 1481 (D.C. Cir. 1985). The precise number was $2,050,000; $250,000 compensatory and $1,800,000 punitive. On the press reaction, see Taylor, *Post Libel Verdict Worries the Press*, New York Times, Aug. 1, 1982, at 20, col. 1.

17. Recent reports as of this writing (January 1986) include the trial court's upholding on motion for judgment n.o.v. of a $1,250,000 verdict in Machleder v. Diaz, 618 F. Supp. 1367 (S.D.N.Y. 1985); a $2,900,000 verdict in Thompson v. Combined Communications of Kentucky, No. 81 CI-03556, slip. op. (Ky. Cir. Ct. 1985); affirmance of the $4.560,000 judgment in McCoy v. Hearst Corp., 174 Cal. App.3d 892, 220 Cal. Rptr. 848 (1985); and a $5,050,000 verdict in Brown & Williamson Tobacco Corp. v. Jacobson, No. 82 C.1648, slip. op. (N.D. Ill. Dec. 17, 1985).

18. It is noteworthy, for instance, that Congressman Schumer has denominated his libel reform bill, *see supra* note 3, a "study" bill.

awards may already have begun.[19]

II. Alice in Damageland

Perhaps lawyers have become so inured to million-dollar verdicts in other areas of the law[20] that they are insensitive to the part Alice-in-Wonderland, part Kafka[21] nature of many large libel judgments. Typically, compensatory damages are based on no more than subjective reports of psychic injury.[22] A million dollars or more in this context is worse than arbitrary. A rule that permits a jury to pick that kind of a number out of thin air, without regard to actual, measurable injury mocks the word "compensation." It is not designed to result in fair and full redress. It is, instead, a license for the jury to vent its anger at the words spoken and whoever spoke them.

In most libel cases,[23] punitive or exemplary damages are added in equally impressive amounts.[24] They at least have the virtue of being forthright in that they *purport* to be punitive. Because their purpose is to insure against repetition of the outrage, their size is at least understandable; it arguably takes a big award to chasten a well-to-do publisher. Nonetheless, civil juries, operating without even the safeguards accorded by the criminal law,[25] should not be commissioned to impose huge penalties on members of the press for the express purpose of silencing them. To allow protection against "unjustified invasion and wrongful hurt" of a person's reputation,[26] beyond full and fair compensation, is profoundly dangerous.[27] Cer-

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19. Separately, control of soaring libel defense costs may also be addressed with currently available tools. *See* Herbert v. Lando, 441 U.S. 153, 176-77 (1979). That subject is, however, beyond the scope of this article.

20. "Megaverdicts" are hardly the sole province of the law of libel. *See, e.g., Business Struggling to Adapt as Insurance Crisis Spreads*, Wall Street Journal, Jan. 21, 1986, at 31, col. 1; *Sky-high damage suits*, U.S. NEWS & WORLD REP., Jan. 27, 1986, at 35. It is not the purpose of this article to examine the overall trend toward seven and eight figure verdicts, but the authors believe that there is a crucial difference between a million-dollar award based on actuarial tables demonstrating lost earnings of a paraplegic, for example, and one based on emotional harm resulting from wrongly being identified as the subject of a nude photograph in a "men's" magazine. *Cf.* Lerman v. Flynt Distributing Co., 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985).

21. Kafka to the defendants; Alice to the casual observer.

22. *See generally* Ollman v. Evans, 750 F.2d 970, 994 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 105 S. Ct. 2662 (1985).

23. LDRC Bulletin No. 11 at 14-17 (1984).

24. For a discussion of the debate surrounding punitive damages, either in general or specifically in the libel-first amendment context, see generally Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847 (1985) and authorities cited therein. Such a discussion is beyond the scope of this article.

25. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

26. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

27. "Punitive damages" may in some cases, as a practical matter, be employed in an attempt to insure complete compensation to the plaintiff by paying him for the time, trouble, strain and expense — especially lawyers' fees — of litigation. *See* Brill, *Inside the Jury Room*

tainly it raises substantial constitutional questions. This is, after all, an area of law that is supposed to be imbued with the spirit of the first amendment, which requires careful protection for, not open season on, those who write, speak, or publish.

The 1985 opinion of the California Court of Appeal in *McCoy v. Hearst Corp.*,[28] illustrates what the authors consider the irrationality and enormity of many modern libel awards. The case dealt with a three-part *San Francisco Examiner* series alleging that, as part of a city-wide crackdown on rampant crime in San Francisco's Chinatown,[29] a prosecutor and two police officers engaged in brutality and subornation of perjury in order to convict one Chinese-American accused of murdering another. The three officials brought suit against the publisher of the *Examiner* and two reporters, one an *Examiner* employee, the other a free-lancer.

The *Examiner* articles were based substantially on an affidavit of a witness in the murder trial. The affidavit recounted various tales of wrongdoing by the plaintiffs. According to the Court of Appeal, the jury could have found proof at the libel trial to have demonstrated "with convincing clarity" that the free-lance reporter in effect "fabricated" the contents of the affidavit.[30] According to the court, the proof also supported a finding that the newspaper and its employee-reporter were guilty of publishing with doubts about the charges and despite serious investigative failures.[31]

The only evidence of injury alluded to by the reviewing court came out of the plaintiffs' own mouths: "Each [plaintiff] testified to the shock and emotional effects they suffered as a result of the articles. They felt [sic] the publications had irrevocably damaged their respective careers and that the effects would be with them for the

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at the Washington Post Libel Trial, AM. LAW., Nov. 1982, at 94 ($1.8 million punitive award in *Tavoulareas v. Piro*, tracked plaintiff's estimated legal fees). Cf. Venturi v Savitt, 191 Conn. 588, 468 A.2d 933, 935 (1985) (limiting punitive damages in Connecticut to the expenses of litigation, less taxable costs.) But if that is what is being done, surely it ought to be done forthrightly, not by misnomer and indirection. If punitive damages are to permit the plaintiff to recover his legal costs, for example, they should be called "legal costs", not "punitive damages." Then the question of their reasonableness and, indeed, whether it is desirable for plaintiffs alone to be able to recover legal costs may be addressed directly and openly.

28. 174 Cal. App.3d 892, 220 Cal. Rptr. 848 (1985). Petitions for review of the case by the California Supreme Court were granted by a vote of 5-1 on January 22, 1986.

29. While we offer no detailed analysis of the liability aspects of the case, we note that the articles read as much as a criticism of the entire San Francisco prosecutorial apparatus, which allegedly would have benefitted politically from a conviction, as they do an indictment of the particular prosecutor and police officers involved. See Exhibit A to the opinion 174 Cal. App.3d at 932-43, 220 Cal. Rptr. at 873-884. "[N]o court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." New York Times Co. v. Sullivan, 376 U.S. 254, 291 (1964) (quoting City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).

30. 174 Cal. App.3d at 931, 220 Cal. Rptr. at 872.

31. *id.* at 913-16, 220 Cal. Rptr. at 859-61.

remainder of their lives."[32]

Before the articles were published, the plaintiff prosecutor moved to New York, where he remains to this day.[33] Whether the plaintiff policemen remained on active duty with the San Francisco Police Department is not reported.

The jury returned identical verdicts of $1,520,000 — $1,000,000 compensatory and $520,000 punitive — for each of the three plaintiffs, a total verdict of $4,560,000. It apportioned $1,500,000 compensatory and $1,500,000 punitive damages against the publisher; $750,000 compensatory and $30,000 punitive against each of the two reporters.[34]

A. "Off with their heads!"[35]

The layman, at least, might sense a strong measure of absurdity in the *McCoy* awards. On what possible basis, other than anger and the symmetry of round numbers, could the jury have decided that $1,000,000 was the amount that would serve to "compensate" each of the three plaintiffs, despite the absence of measurable harm? One million dollars invested at ten percent, after all, would provide each plaintiff with a lifetime income in excess of that presently enjoyed by either San Francisco's Chief of Police or its District Attorney,[36] with the entire $1,000,000 principal remaining at the end of their days to comfort the plaintiffs' bereaved.

Could it possibly be that each plaintiff, the two resident policemen and the ex-resident ex-prosecutor alike, were *identically* injured so that *identical* "compensatory" awards were required? In light of the Court of Appeal's strong suggestion that the free-lance journalist, the "fabricator" of the major charges against the plaintiffs, was

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32. *Id.* at 931, 220 Cal. Rptr. at 872.

33. *Id.* at 933, 220 Cal. Rptr. at 873. The former Assistant District Attorney is in private practice in New York; his employment as a prosecutor, according to his 1985 Martindale-Hubbell listing, ended in 1973, some three years before the articles' publications. *See* IV MARTINDALE-HUBBELL LAW DIRECTORY 1833B (1985).

34. 174 Cal. App.3d at 904, 220 Cal. Rptr. at 852.

35. "The Queen turned crimson with fury, and after glaring at [Alice] for a moment like a wild beast, began screaming, 'Off with her head! Off with —'." L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND Chapter VIII.

36. San Francisco's Chief of Police is currently paid $91,000 a year. *See* San Francisco Examiner, Jan. 7, 1986, at B1. The San Francisco District Attorney's 1986 salary is $89,941. *See* City and County of San Francisco, Cal., Salary Standardization Ordinance for the Fiscal Year 1985-86, at 115. One can, of course, debate the hypothetical figures: punitive damages are ignored, legal costs are ignored (jurors normally are not instructed to take them into account anyhow), awards may in fact be taxable in whole or in part. *See* Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983) (not taxable); Church v. Commissioner, 80 T.C. 1104 (1983); Rev. Rul. 85-143, 1985-37 I.R.B. 7 (IRS will follow position of Tax Court, rather than Court of Appeals in *Roemer*). But whatever numbers one chooses, the point remains that awards on this scale are appropriate to someone who literally must be supported by the judgment for life, not to reparation of hurt feelings and reputation. As a matter of compensation, $1,000,000 to each of the *McCoy* plaintiffs was simply in the wrong order of magnitude.

substantially more culpable than the newspaper and the other reporter, why were both the compensatory *and* punitive awards against the free-lancer *identical* to those against the less blameworthy reporter?[37] Why, indeed, was the guilty free-lancer called upon to pay only half as much to "compensate" the plaintiffs as was the relatively passive newspaper defendant? Did the deep pocket of one weigh precisely twice as much as the perceived guilt of the other?

Whatever our hypothetical layman might think, the court of appeals was troubled by none of this. It affirmed the damage awards in four short paragraphs, citing legal principles requiring deference by reviewing courts to the discretion of jury and trial judge in such matters.[38] Commenting on the punitive award, the court neatly summed up its perceived responsibility: "We must uphold an award of damages wherever possible."[39]

III. Libel Damages in the Supreme Court

The epidemic of megaverdicts may be relatively recent, but concern about the impact on freedom of expression of huge libel judgments unrelated to measurable injury most assuredly is not. The seminal constitutional libel case, *New York Times Co. v. Sullivan*,[40] was based substantially on this concern:

> The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute . . . . Presumably a person charged with violation of [an Alabama criminal libel] statute enjoys ordinary criminal law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The [$500,000] judgment awarded in this case — without the need for any proof of actual pecuniary loss — was one thousand times greater than the maximum fine provided by the Alabama criminal statute . . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.[41] Whether or not a newspa-

37. *Cf.* Faulk v. Aware, Inc. 19 A.D.2d 464, 472, 244 N.Y.S.2d 259 (1963), *aff'd*, 14 N.Y.2d 899, 200 N.E.2d 778, 252 N.Y.S.2d 95 (1964), *cert. denied*, 380 U.S. 916 (1965) ("The jury awarded [identical sums] against each of the two appellants. However, one was more culpable than the other. They should not be punished alike.").

38. 174 Cal. App.3d at 931-32, 220 Cal. Rptr. at 871-72.

39. *Id.* at 932, 220 Cal. Rptr. at 872 (citation omitted).

40. 376 U.S. 254 (1964).

41. The Court here noted: "The [defendant] states that four other libel suits based on the advertisement [in issue] have been filed against it by others . . .; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000." *Id.* at 278, n.18. Doubts have indeed been expressed about whether The New York Times Company could have survived an adverse decision in *Sullivan*. Goodale, *Is the Public "Getting Even" with Press in Libel Cases?*,

per 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 . . . .[42]

In developing tort law, courts operate largely through contractions or expansions of (i) the applicable standard of care, or (ii) the amount and type of available damage awards.[43] What is interesting about *Sullivan* in this context is that the Supreme Court was motivated by the spectre of limitless arbitrary damage awards, yet it responded solely by raising the applicable standard of care in libel suits involving "public officials."[44] Rather than impose limits on the amount of damage judgments in order to reduce the in terrorem effect, the Court required public-official plaintiffs to prove "actual malice" with "convincing clarity" before they could recover at all. The result has been to raise enormous barriers to recovery.[45] Nonetheless, courts still lack a way of judging in first amendment terms the propriety of the amount of an award, however stupendous,[46] once the liability hurdle has been surmounted.[47]

This is not to say that members of the Supreme Court have not considered direct action on the damage problem. They have. But in only one case[48] has this concern manifested itself in a court holding, and that case has not had a perceptible effect on astronomical verdicts, at least in public official or public figure cases.

In *Rosenbloom v. Metromedia, Inc.*,[49] Justices Harlan and Marshall urged that punitive and presumed damages be closely scrutinized and carefully limited,[50] or eliminated altogether.[51] More re-

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N.Y.L.J., Aug. 11, 1982, at 2, col. 2.

42. 376 U.S. at 277-78 (citation omitted). The Court was also influenced by the cost of defense of libel suits: "Under . . . a rule [permitting truth alone to be a defense], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so.*" *Id.* at 279 (emphasis supplied).

43. *See, e.g.*, Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 747 (1984).

44. Extended to "public figures" in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 n.10 (1974).

45. There is a temptation to feel that, because the difficulties of winning a "public figure" or "public official" libel suit are so great, once liability has been established, the plaintiff should be permitted to win big. But that is a lottery theory — greater risk deserves greater reward — not a legal theory. There is no reason to permit compensatory damages to do more than compensate, however hard the victory.

46. *Cf.* Ollman v. Evans, 750 F.2d 970, 988 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 105 S. Ct. 2662 (1985).

47. This is not meant to imply that the authors disagree with the "actual malice" rule, which is designed to do no more than protect good faith error in the discussion of public affairs, a crucial protection in our society.

48. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). For a discussion of the *Gertz* case, see *infra* notes 54-58, and accompanying text.

49. 403 U.S. 29 (1971).

50. *Id.* at 72-77 (Harlan, J., dissenting). Justice Harlan admitted that his conclusions

cently, concurring in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[52] Justice White suggested abandoning all or part of the heightened standard of liability imposed in *Sullivan* in exchange for a direct approach to the damage issue:

> In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in *Rosenbloom* or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in *Gertz v. Robert Welch, Inc.*[53]

Only in *Gertz v. Robert Welch, Inc.*[54] itself did a majority of the Court approach damages directly. There the Court restricted defamation plaintiffs who do not prove "actual malice," that is, knowledge of falsity or reckless disregard for the truth, to compensation for actual injury.[55] The Court held that the Constitution prohibits awards of punitive damages unless "actual malice" is first proved.[56]

But neither of these *Gertz* damage rules has had any effect on "public official" or "public figure" cases because the very finding of liability, based as it is on a finding of "actual malice," carries with it the permissibility of awards beyond compensation for actual injury, including punitive damages.[57] Moreover, "actual injury" itself was defined in such vague and broad terms by the *Gertz* Court that even in private plaintiff litigation, in which the *Gertz* limitations are designed to have their effect, the limitation of recovery to compensation for "actual injury" apparently has never served to reduce, let alone proscribe, a verdict. Only in the realm of punitive damages for private plaintiffs has Supreme Court doctrine, as stated in *Gertz*, acted to limit the damage risk.[58]

Meanwhile, the failure of the Court to place an effective limita-

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on damages in *Rosenbloom* were at some variance from those he had reached in Curtis Publishing Co. v. Butts, 388 U.S. 130, 159-61 (1967). *See Rosenbloom*, 403 U.S. at 72 n.3 (Harlan, J., dissenting).

51. *Rosenbloom*, 403 U.S. at 78-87 (Marshall, J., dissenting).

52. 105 S. Ct. 2939, 2948 *passim* (1985) (White, J., concurring).

53. *Id.* at 2952 (White, J., concurring).

54. 418 U.S. 323 (1974).

55. *Id.* at 349. "[A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

56. *Id.* at 349.

57. *See, e.g.*, Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1029-30 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

58. *See, e.g.*, Gazette v. Harris, 229 Va. 1, 42, 325 S.E.2d 713, 741 (1984), *cert. denied*, 105 S. Ct. 3513 (1985).

tion on the size of damage awards was starkly illustrated by its refusal in *Time, Inc. v. Firestone*[59] to scrutinize a defamation award of $100,000 for emotional distress even without attendant harm to reputation. Not a single justice objected to Justice Rehnquist's "cf." citation to *City of Lincoln v. Power*[60] for the proposition that, "We have no warrant for re-examining this determination."[61] In *Power*, a personal injury case, the Court held:

> The plaintiff in error complains that the damages found by the jury were excessive, and appear to have been given under the influence of passion and prejudice.
>
> But it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury.[62]

Thus, the Supreme Court has done little to fashion a doctrine that would check immense verdicts unrelated to demonstrable, concrete injury. Other courts, generally, have done little better.

IV. Libel Damages in State Courts

Hardly any two jurisdictions make use of the same test for evaluating the amount of damages awarded by juries or judges. Two general approaches are most common. The first simply requires an evaluation of whether the damages awarded were "reasonable," either as compensation[63] or as punishment.[64] A second line of cases uses a more subjective analysis: "Unless the amount of the award is so excessive as to shock the conscience of the court, or to create the impression that the jury was influenced by passion or prejudice, a verdict approved by the trial court will not be disturbed on appeal."[65] Many cases use no discernible legal standard at all, but

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59. 424 U.S. 448, 460-61 (1976).
60. 151 U.S. 436 (1894).
61. *Firestone*, 424 U.S. at 461.
62. *Power*, 151 U.S. at 437.
63. *See, e.g.*, Bayoud v. Sigler, 555 S.W.2d 913, 916 (Tex. App. 1977) (jury awards of $75,000 compensatory and $150,000 punitive damages eventually reduced to $25,000 compensatory and $10,000 punitive); *see also* Vassiliades v. Garfinkel's, No. 83-1255 (D.C. 1985) (new trial ordered after $350,000 compensatory award for privacy claims); *cf.* Liquori v. Republican Co., 8 Mass. App. 671, 396 N.E.2d 726, 732 (1979) (upholding verdict of $60,000 compensatory damages).
64. *See, e.g.*, Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (reducing punitive award of $7,500 to $1,000); Collins v. Retail Credit Co., 410 F. Supp. 924, 934 (E.D. Mich. 1976) (reducing punitive award of $300,000 to $50,000).
65. Gazette, Inc., v. Harris, 229 Va. 1, 41, 325 S.E.2d 713, 740 (1984), *cert. denied*, 105 S. Ct. 3513 (1985) (remanding award of $100,000 compensatory and $250,000 punitive damages for remittitur or retrial); *see also* Re v. Gannett Co., 480 A.2d 662 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553 (Del. 1985) (remanding jury award of $1,335,000 for new trial on damages); Elyria-Lorian Broadcasting Co. v. National Communications Ind., Inc., 300 So.2d 716, 719 (Fla. App. 1974) (nominal damages of $1; punitive award of $5,000 reduced to

merely examine the damages awarded in light of the record evidence adduced.[66]

None of these lines of authority has provided a systematic and predictable body of law that can be relied upon to control bloated verdicts or their impact upon free expression. Thus, while the perceived dangers of large verdicts led state and lower federal courts to follow the Supreme Court down the road of limiting liability in defamation litigation,[67] little has been done to limit the size of the ver-

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$500); Perfect Fit Ind., Inc. v. Acme Quilting Co., 494 F. Supp. 505, 508 (S.D.N.Y. 1980) (jury award of $2,500,000 compensatory and $5,000,000 punitive damages vacated and trial de novo ordered); *cf.* Brown v. Skaggs-Albertson's Properties, Inc., 563 F.2d 983, 988 (10th Cir. 1977) (upholding verdict of $20,000 compensatory and $10,000 punitive damages); Machleder v. Diaz, 618 F. Supp. 1367, 1375-76 (S.D.N.Y. 1985) (upholding verdict $250,000 compensatory and $1,000,000 punitive damages for "false light" invasion of privacy); McCoy v. Hearst Corp., 174 Cal. App.3d 892, 220 Cal. Rptr. 848 (1985) (upholding verdict of $3,000,000 compensatory and $1,560,000 punitive damages); Roemer v. Retail Credit Co., 44 Cal. App.3d 926, 936-38, 119 Cal. Rptr. 82, 88-89 (1975) (upholding verdict of $40,000 compensatory and $250,000 punitive damages). This test traces its roots back to the rule laid down by Chancellor Kent in Coleman v. Southwick, 9 Johns. 45, 52 (N.Y. 1812):

> The damages . . . must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.

66. *See, e.g.*, Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1143 (7th Cir. 1985) (criticizing, in dicta, calculations of present value of allegedly lost stream of future earnings); Himango v. Prime Time Broadcasting, Inc., 37 Wash. App. 259, 266-68, 680 P.2d 432, 438-39 (1984) (affirming trial court's reduction of jury award from $250,000 to $70,000); Dattner v. Pokoik, 81 A.D.2d 572, 574, 437 N.Y.S.2d 425, 428 (1981) (reducing damages from $75,000 compensatory and $35,000 punitive to $25,000 compensatory and $12,500 punitive); Laskowski v. County of Nassau, 57 A.d.2d. 888, 889, 394 N.Y.S.2d 442, 444 (1977) (slander award reduced from $4,500 to $2,000); *cf.* Diaz v. Oakland Tribune, Inc., 139 Cal. App.3d 118, 136-37, 188 Cal. Rptr. 762, 774-75 (1983) (approving, in dicta, verdict of $250,000 compensatory and $525,000 punitive damages for intimate facts invasion of privacy as to damages, after reversing as to liability).

Limitations on punitive damages are, on the whole, little more effective. Some courts have, however, considered the appropriate ratio of an award to the defendant's new worth or net income. *See* Burnett v. National Enquirer, Inc., 144 Cal. App.3d 991, 1012, 193 Cal. Rptr. 206, 219 (1983), *appeal dismissed*, 465 U.S. 1014 (1984) (award of 29% of net worth and 48% of net annual income reduced to 6% of net worth and 10% of net income); *see also* Nevada Independent Broadcasting Corp v. Allen, 99 Nev. 404, 664 P.2d 337, 346 (1983) (fact that award amounted to 10% of defendant's net worth suggests that it was intended to be punitive).

Even less straightforward is the law relating punitive to compensatory damages. In defamation or privacy cases that have specifically addressed this question, a compensatory-to-punitive damages ratio of as high as 1:3 has been upheld. *See* Braun v. Flynt, 726 F.2d 245, 257-58 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 252 (1984); *see also* Appleyard v. Transamerican Press Inc., 539 F.2d 1026, 1030 (4th Cir. 1976) (approving 2:1 ratio); McCoy v. Hearst Corp., 174 Cal. App.3d 892, 932, 220 Cal. Rptr. 848, 872 (1985) (same); Prince v. Peterson, 538 P.2d 1325, 1329 (Utah 1975) (lowering punitive award to 5.5:1 ratio). On the other hand, a ratio as low as 1:15 has been rejected. *See* Burnett v. National Enquirer, Inc., 144 Cal. App.3d 991, 1011, 193 Cal. Rptr. 206, 218 (1983), *appeal dismissed*, 465 U.S. 1014 (1984) ("it is our duty it intervene where punitive damages are so palpably excessive or grossly disproportionate as to raise a presumption they resulted from passion or prejudice").

67. This Supreme Court has, in effect, told defendants that they have all the constitutional protection against liability that it is going to give them. *See, e.g.*, Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Dun & Bradstreet,

dicts directly.

V. Limitations on Libel Damages: First Steps Down the Road Not Taken

There are indications, however, that some judges perceive the strain of irrationality in many large defamation verdicts and the attendant dangers to freedom of expression. A few courts have begun to walk down the road not taken by subjecting the amount of libel awards to strict scrutiny, often with the threat to free speech firmly in mind.

The most obvious opportunity for reform is in the area of punitive damages. Here, a recent Texas case applied state rules to forbid punitive damages in the absence of a compensatory judgment.[68] Rules that proscribe awards, which are in fact designed to punish rather than compensate, essentially reach the same result.[69]

At least two states have gone farther, banning punitive damages in defamation cases altogether.[70] The Supreme Judicial Court of Massachusetts, in reaching this conclusion, declared:

> We reject the allowance of punitive damages in this Commonwealth in any defamation action, on any state of proof, whether based in negligence, or reckless or wilful conduct. We so hold in recognition that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship.[71]

Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).

68. Doubleday & Co. v. Rogers, 674 S.W.2d 751, 753-54 (Tex. 1984).

69. *See, e.g.*, Postill v. Booth Newspapers, Inc., 118 Mich. App. 608, 628, 325 N.W.2d 511, 520 (1982). *Contra, e.g.*, Elyria-Lorain Broadcasting Co. v. National Communications Ind., Inc., 300 So.2d 716 (Fla. App. 1974) ($1 nominal award will support $500 punitive damages); IBEW v. Mayo, 35 Md. App. 169, 180-81, 370 A.2d 130, 136 (1977), *aff'd*, 781 Md. 475, 379 A.2d 1223 (1977). Reynolds v. Pegler, 123 F. Supp. 36, 38 (S.D.N.Y. 1954), *aff'd*, 223 F.2d 429 (2d Cir. 1955), *cert. denied*, 350 U.S. 846 (1955), which is also to the contrary, was of course decided before the development of the modern constitutionalized law of defamation. Nevertheless, it is probably of some continuing vitality. *See* Doubleday & Co. v. Rogers, 674 S.W.2d 751, 760 (Tex. 1984) (Ray, J., dissenting).

70. *See* Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); *see also* Postill v. Booth Newspapers Inc., 118 Mich. App. 608, 325 N.W.2d 511 (1982). In Louisiana, Nebraska, New Hampshire and Washington State, punitive damages are generally not available in civil actions. LDRC 50 STATE SURVEY 1984 423 (Kaufman ed. 1984) (Louisiana statute); Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975); Baer v. Rosenblatt, 106 N.H. 26, 203 A.2d 773 (1964), *rev'd on other grounds*, 383 U.S. 75 (1966); Farrar v. Tribune Pub. Co., 57 Wash.2d 549, 358 P.2d 792 (1961). In Spokane Truck and Dray Co. v. Hoefer, 2 Wash. 45, 54, 25 P. 1072, 1074 (1891), the Washington Supreme Court declared that "punitive damages cannot be allowed on the theory that it is for the benefit of society at large [which is protected by the criminal law], but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated; a theory which is repugnant to every sense of justice."

71. Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 169

Compensatory damage judgments have also been reviewed with an eye toward their impact on free expression. In *Nevada Independent Broadcasting Corp. v. Allen*,[72] for example, the Supreme Court of Nevada said, "We are of the opinion that in a public figure slander case against media defendants added scrutiny must be given to large compensatory damage awards because of their impact on free speech."[73] The "added scrutiny" led to the reduction of a damage award from $675,000 to $50,000 because of the court's conclusion that "an award of this kind and magnitude may constitute a threat to the exercise of free speech."[74]

Similarly, in *Kidder v. Anderson*,[75] a Louisiana appellate court reduced a compensatory award from $400,000 to $100,000, noting that "an award in such amount would have a 'chilling effect' upon the legitimate exercise of the rights of freedom of the press and would lead to undesirable self-censorship, the prevention of which has been the object and purpose of the United States Supreme Court since *New York Times Company v. Sullivan*."[76]

Courts have been increasingly sensitive to huge awards based largely or solely on a jury's reaction to allegations of emotional distress. One court, ironically, noted that the limited publication of the alleged defamation necessarily limited the embarrassment and humiliation, that is, the decline in *self*-reputation, suffered by the plaintiff.[77] In *Burnett v. National Enquirer, Inc.*, the "reasonableness" standard of limiting excessive damages was applied to reduce a compensatory award by a factor of six.[78]

In *Gazette, Inc. v. Harris*,[79] the Supreme Court of Virginia considered, among several compensatory awards, an award for $100,000 against a real estate developer who had published an advertisement accusing the plaintiff university professor of racism. After incanting

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(1975).

72. 99 Nev. 404, 664 P.2d 337 (1983).

73. *Id.* at 418, 664 P.2d at 347.

74. *Id.*

75. 345 So.2d 922 (La. Ct. App. 1977), *rev'd on other grounds*, 354 So.2d 1306 (La.), *cert. denied*, 439 U. 829 (1978).

76. *Id.* at 942.

77. Pirre v. Printing Developments, Inc., 468 F. Supp. 1028, 1038 (S.D.N.Y. 1978), *aff'd*, 614 F.2d 1290 (2d Cir. 1979) (reducing part of compensatory award attributed to emotional harm from $325,000 to $45,000, noting that audience was smaller than that in *Time, Inc. v. Firestone*).

78. Burnett v. National Enquirer, Inc., 7 MEDIA L. RPTR. (BNA) 1321, 1323-24 (Cal. Super. Ct. 1981), *aff'd on relevant grounds*, 144 Cal. App.3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984) (compensatory damages reduced from $300,000 to $50,000 by trial judge on "reasonableness" standard); *see also* Nellis v. Miller, 101 A.D.2d 1002, 477 N.Y.S.2d 72 (1984) (reducing compensatory award from $150,000 to $5,000 and punitive award from $100,000 to $15,000 when "[t]he only proof of injury is plaintiff's self-serving testimony."). Statutes limiting harm for non-economic recovery are similarly motivated. *See* Calif. Civ. Code § 3333.2(b) (West 1986).

79. 229 Va. 1, 325 S.E.2d 713 (1984), *cert. denied*, 105 S. Ct. 3513 (1985).

that a jury verdict approved by the trial judge is to be "held to be inviolate against disturbance by the courts," the court nonetheless reversed and remanded,[80] saying that "[a] healthy administration of justice requires that, in a proper case, the courts must take action to correct what plainly appears to be an unfair verdict."[81]

> [T]he amount of the award bears no relationship to the loss actually sustained by the plaintiff. Clearly [the plaintiff] suffered damage to his reputation, embarrassment, humiliation, and mental suffering from this defamatory publication . . . . Nevertheless, the verdict of $100,000 is so out of proportion to the damages sustained as to be excessive as a matter of law.[82]

The court noted that the plaintiff "experienced no physical manifestation of any emotional distress," sought no medical attention, suffered no diminution of his standing with his peers and, indeed, was supported by his acquaintances and continued "to be held in high esteem among his community of friends and colleagues."[83] "Thus," the court concluded, "we find that the amount of the verdict bears no reasonable relation to the damages sustained and, therefore, is not supported by the evidence."[84]

This issue has recently been addressed by two federal appeals courts. In *Lerman v. Flynt Distributing Co.*,[85] the Second Circuit reversed, on liability, a judgment of $3,000,000 punitive damages,

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80. The court "reverse[d] the compensatory award and remand[ed] the case with direction to the trial court to require the plaintiff to remit a substantial part of his recovery or else submit to a new trial upon the issue of damages only." 229 Va. at 49, 325 S.E.2d at 745.

As to whether a remittitur or new trial is required in the event a verdict is found to be excessive, *see* Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1356 (Colo. 1983):

> In a case where general damages are granted, a new trial and not remittitur is the proper remedy if passion and prejudice have affected the verdict . . . . If, instead, the trial court concludes that the verdict was not influenced by extreme considerations, but that the damages were manifestly excessive in light of the evidence presented at trial, then the trial court's order of remittitur should stand.

The opinion thus makes clear that, in Colorado at least, no finding of "passion" or "prejudice" is necessary to reduce the size of a verdict, and the existence of such "passion" or "prejudice" taints the entire trial, not just the amount of the damage award.

At least one appellate court has indicated that a decision to grant a new trial on such grounds is virtually unreviewable. *See* Widener v. Pacific Gas & Electric Co., 75 Cal. App.3d 415, 443, 142 Cal. Rptr. 304, 320 (1977), *cert. denied*, 436 U.S. 918 (1978) (in affirming order of new trial after verdict of $700,000 compensatory and $7,008,000 punitive damages, court said "where there is *any* substantial support in the record, it cannot be said that the trial court abused its discretion in granting a new trial").

81. *Harris*, 229 Va. at 48, 325 S.E.2d at 744, (quoting Smithey v. Sinclair Refining Co., 203 Va. 142, 145, 122 S.E.2d 872, 875-76 (1961)).

82. *Id.* at 48, 325 S.E.2d at 745.

83. *Id.*

84. *Id.* In a companion case addressed in the same opinion, the court held that another award, $50,000 to two plaintiffs jointly in a libel case, was not improper in light of the facts of the case, judged against the standard of whether the verdict was "so excessive as to shock the conscience of the court, or to create the impression that the jury was influenced by passion or prejudice." *Id.* at 41, 325 S.E.2d at 740.

85. 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985).

which the trial judge had reduced from $33,000,000, and $7,000,000 compensatory damages in a common-law right of publicity action that grew out of the publication of nude photographs falsely said to be of the plaintiff. The appeals court ordered the case dismissed, but in dicta observed:

> It cannot seriously be contended that [the plaintiff's] lacerated feelings are worth anything close to $7 million. No proof was offered that she sought or needed professional help because of these publications and the fact that she completed a novel [in the seven months following the publication] refutes her contention that she was unable to work.[86]

The court said that "a verdict of this size does more than chill an individual defendant's rights, it deep-freezes that particular media defendant permanently."[87] It then suggested by analogy to other cases that the appropriate range of damages was $1,500 to $45,000 for "injury to feelings."[88]

Lerman was cited with apparent approval ten months later by the Seventh Circuit in *Douglass v. Hustler Magazine, Inc.*,[89] a false light case dealing with the publication of nude photographs taken for *Playboy* which were published by *Hustler* without further authorization. The Court of Appeals deduced that the jury had intended $300,000 of a $1,000,000 compensatory award to cover emotional distress. Even though the court ordered a new trial because of the erroneous admission of prejudicial evidence, the court said:

> The $300,000 for emotional distress is an absurd figure. Though distressed by the Hustler incident, Douglass suffered no severe or permanent psychiatric harm — nothing more than transitory emotional distress . . . . The figure is ridiculous in relation to the highest judgment yet upheld on appeal in a series of cases arising from the Chicago Police Department's former practice of 'strip searching' women arrested for minor crimes (mainly traffic offenses): $60,000 . . . . We will not allow plaintiffs to throw themselves on the generosity of the jury; if they want damages they must prove them . . . .
>
> Modest compensatory damages are, as they should be, the norm in these cases . . . .[90]

By analogies similar to those made in *Lerman*, the *Douglass* court

86. *Id.* at 141.

87. *Id.*; *see also* Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, 692 (1975), *cert. denied*, 423 U.S. 882 (1975) (striking $500,000 punitive damage award on top of approved $250,000 compensatory award on grounds deterrence has been achieved and additional award would be chilling and "might jeopardize the existence of a newspaper").

88. *Lerman*, 745 F.2d at 141.

89. 769 F.2d 1128, 1144 (7th Cir. 1985).

90. *Id.*

suggested a cap on compensatory damages for emotional distress of $60,000 to $150,000.[91]

There is nothing new, of course, about appellate courts reducing verdicts. What is noteworthy about these cases is the recognition of the absurdity of megaverdicts as compensation for mere emotional distress and of the danger presented by such awards in first amendment terms.

There is an aura of "The Emperor's New Clothes" in all of this, a sense of shouting out the obvious. Obviously, these million-dollar awards were not designed to compensate, they were intended to vent outrage. But to permit a jury to express its anger, under the guise of deference to jury verdicts, is to warn editors and reporters to steer clear of material juries might not like. The first amendment was designed in large part to protect speech from just such popular wrath.[92] Our system is wary of official determinations regarding what is "true" and what is "false". Even where falsehood is determined, it is better answered with reason than the rod, lest punishment of today's falsehood smother tomorrow's truth.

VI. Conclusion

The rise of the megaverdict, and the response of the courts, suggest: first, complete solutions to today's libel problems, even if wise, are not likely to be at hand. Second, one of the most pressing of these problems is damage awards that punish rather than compensate. Third, if full compensation requires payment for the plaintiff's

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91. *Id.* at 1144-45. While Judge Posner, speaking for the court, acknowledged the court's special obligation "to be assiduous in protecting the press . . . from the fury of outraged juries," *id.* at 1142, he also noted that the trial judge's remittitur of all but $100,000 of punitive damages (the jury had awarded $1,500,000) was "inconsistent with the principal purpose of punitive damages, which is to deter." *Id.* at 1145. He suggested that "the profits of the entire issue [in which the photos appeared] might be a reasonable starting point for assessing punitive damages." *Id.* The implicit judgment would seem to be that any speech *tainted* by defamation deserves to be silenced *altogether.*

92.

> Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. *Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.*

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (emphasis supplied). Civil juries are themselves majoritarian in nature; our system therefore provides for limits on their power. Thus, de Tocqueville's discussion of how judges check the discretion and guide the deliberations of juries comprises half of his chapter on "Causes Which Mitigate the Tyranny of the Majority in the United States." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA chap. XVI.

expense of time and money, specifically legal fees and costs not ordinarily considered reimbursable absent statutory authorization, courts or legislatures should address those problems directly and specifically rather than allowing them to be covered *sub silentio* and unreviewably in punitive or in bloated compensatory awards. Fourth, libel litigation should not become a lottery in which huge damages are to be countenanced simply because the odds against a plaintiff winning are so high. Fifth, faced with exaggerated verdicts and their likely effect on freedom of expression, some courts have begun to scrutinize verdicts carefully to ensure that what purports to be compensatory in fact compensates, and that if punitive damages are allowed at all, they are held within the bounds of reason. And finally, courts that have taken the first steps down that road are surely headed in the right direction.