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Forty Years After *New York Times v. Sullivan*: The Good, the Bad, and the Ugly

Any similarity between the title of my remarks and a famous Clint Eastwood movie is purely coincidental. I chose the title because it nicely summarized what I wanted to talk about at this Conference examining *New York Times Co. v. Sullivan* forty years later.[1] But as I began thinking about old Clint, one of his more famous lines came to mind. Remember in *Dirty Harry*, when his character confronts a bad guy in an armed standoff, and with that classic Eastwood squinty snarl asks: "You've got to ask yourself a question: Do I feel lucky?"[2] It seems to me in many ways that this line, perhaps better than any other, sums up a good bit of what libel litigation is like today in the wake of the *Sullivan* case.

The particular question posed by this panel is: does *Sullivan* represent a constitutional revolution? The easy answer is clearly yes. The decision overturned the view previously expressed by the Supreme Court that libel was a form of unprotected speech,[3] and it upended hundreds of years of settled common and state

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

2 The Movie Quotes Site, *at* http://moviequotes.com/fullquote.cgi?qnum=6093 (last visited Feb. 27, 2005).

3 *See* Beauharnais v. Illinois, 343 U.S. 250, 292 (1952) ("[P]unishment of libelous words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace' has never been thought to raise any constitutional problem." (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942))).

defamation law.[4] The more interesting question is whether the case has fulfilled its central promise to create a legal regime that fosters "uninhibited, robust, and wide-open" debate.[5] That answer may depend on one's perspective: what might the libel world look like without the protections afforded by *Sullivan* as opposed to what the world looks like with it? It is those questions that lead to the title of my remarks: *The Good, the Bad, and the Ugly*.

I

THE GOOD

Given how radically *Sullivan* and its progeny have changed defamation law over the last forty years, it is hard to imagine what the world might look like without it. My instinct, however, is that absent its considerable constitutional restraints, the picture would not be pretty—at least from the media perspective, which is where I admittedly come from.

A. The International Libel Capital

To get an idea of what the world might be like without *Sullivan*, we can look at the state of affairs in England, which largely still applies the common law of libel and offers little if any special protection to the press or any other speaker who utters defamatory remarks. In England, a libel plaintiff still need prove only that the defendant published a statement capable of defamatory meaning and the burden then shifts to the defendant to prove truth or privilege.[6] Although England does recognize some privilege for certain kinds of statements about government or those holding public office, it has expressly rejected the kinds of protection offered by *Sullivan*.[7] As described by Rod Smolla:

> This striking disparity between American and British libel law has led to a curious recent phenomenon, a sort of balance of trade deficit in libel litigation: Prominent persons who receive bad press in publications distributed primarily in the United

[4] There is a large volume of scholarly literature on the changes to defamation law wrought by *Sullivan* and its progeny. Much of the most notable scholarship has been catalogued by Professor David Anderson. *See* David A. Anderson, *Is Libel Law Worth Reforming?,* 140 U. PA. L. REV. 487, 488 n.3 (1991).

[5] *Sullivan*, 376 U.S. at 270.

[6] *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.03[2] (1991).

[7] *See* Reynolds v. Times Newspapers Ltd., [1999] W.L.R. 1010 (House of Lords 1999).

> States now often choose to file their libel suits in England. London has become an international libel capital. Plaintiffs with the wherewithal to do so now often choose to file suit in Britain in order to exploit Britain's strict libel laws, even when the plaintiffs and the publication have little connection to that country.[8]

In a similar vein, Geoffrey Robertson and Andrew Nichol, in their text on media law, observed that "British libel law is so notoriously favourable to plaintiffs that an increasing number of forum-shopping foreigners are taking action in London against newspapers and books that are printed, and mainly circulated, abroad."[9]

If the British experience is any indication, it seems reasonable to surmise that in the absence of *Sullivan*, people—and in particular prominent or powerful people—aggrieved by a defamatory publication (or broadcast) would more willingly and frequently bring suit in the United States. Indeed, because of certain constraints on litigation in the United Kingdom that do not apply in the United States, I suspect plaintiff activity here would be, to steal Justice Brennan's phrase, far more robust and uninhibited than it is in England.[10]

In England there are at least two constraints on litigation that have little or no applicability in the United States. First, in England the loser ordinarily pays the costs of litigation, including reasonable attorneys' fees, incurred by the winning party.[11] The rule in the United States is precisely the opposite; each party bears its own fees in most libel litigation,[12] and plaintiffs here typically are represented by counsel on a contingent fee basis.[13] Thus, an unsuccessful plaintiff in the United States ordinarily will

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[8] SMOLLA, *supra* note 6, § 1.03[3]. Plaintiffs' gravitation to more favorable libel venues outside the United States extends beyond England. *See* Mark Thompson, *Lawyers Alarmed by International Libel Lawsuit Trend*, USC Annenberg Online Journalism Review, (Nov. 2, 2004), *at* http://www.ojr.org/ojr/law/1099435840.php (last visited Feb. 27, 2005). **R**

[9] GEOFFREY ROBERTSON Q.C. & ANDREW NICHOL, MEDIA LAW 65 (3d ed., Penguin Books 1992).

[10] *Sullivan*, 376 U.S. at 270.

[11] *See* PATRICK MILMO & W.V.H. ROGERS, EDS., GATLEY ON LIBEL AND SLANDER § 35:12 (10th ed. 2004).

[12] The only real exception is where a party has litigated frivolously, but this happens only rarely. *See* Seth Goodchild, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 344-45 (1986).

[13] *See* RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 148 (1987) (finding that more than eighty percent of plaintiffs in a study of libel litigation were represented on a contingent fee basis).

not be exposed to significant financial liability from a defeat.[14] In England, however, plaintiffs do have a financial downside which should at least have some governing effect.

Second, in England, courts impose fairly strict limits on the size of damage awards in libel cases.[15] As I will discuss more fully later,[16] in the United States there is a tradition of much larger damage awards, including significant punitive damages which would make litigation here even more attractive in the absence of *Sullivan*. One need only look at the *Sullivan* case itself to see how difficult things might have been here. *Sullivan* arose out of a $500,000 verdict,[17] which in 1964 was a lot of money. Moreover, as recounted in Justice Black's concurring opinion, another $500,000 verdict had been entered against the *Times* arising out of the same advertisement, and eleven suits were pending by local and state Alabama officials against the Times seeking $5.6 million and five suits against CBS seeking $1.7 million.[18] Although *Sullivan* arose out of unusual and particularly charged circumstances,[19] so too do many other libel cases involve strongly held convictions and causes that might well be perceived as unpopular by local juries and judges,[20] and the circumstances of the case illustrate the crippling potential of an unchecked defamation law in the United States.

B. Presidents, Patriots, and Preachers

To appreciate the importance of *Sullivan*, consider how in the

[14] This is not to say there are no disincentives on plaintiffs and their lawyers under the American system. As Professor David Anderson has perceptively recognized, other factors may discourage prospective litigants and their counsel, but Anderson's analysis was in the context of the *Sullivan* world, which makes recovery more difficult, while I am surmising a world without *Sullivan*. *See* Anderson, *supra* note 4, at 524-36. **R**

[15] See MILMO & ROGERS, *supra* note 11, § 9.3 (explaining that for non-pecuniary losses, a maximum of about £200,000 can be awarded "for an outrageously bad case of libel"). **R**

[16] See *infra* text accompanying notes 67-70.

[17] *Sullivan*, 376 U.S. at 256.

[18] *Id*. at 294-95 (Black, J., concurring).

[19] For a fascinating and in-depth look at *New York Times Co. v. Sullivan*, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

[20] Consider, for example, the libel case brought by General William Westmoreland against CBS, which concerned issues arising out of the Vietnam War, one of the most difficult and painful chapters in our country's history. *See generally* Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time To Return To "The Meaning Of The First Amendment"*, 83 COLUM. L. REV. 603, 626 (1983).

1970s some of the Watergate conspirators might have used the law of libel to deter reporting in the early stages of the *Washington Post*'s investigation. Sound farfetched?[21] Perhaps not in light of *MMAR Group, Inc. v. Dow Jones & Co.,*[22] a case that demonstrates how much difference *Sullivan* can make where a plaintiff is bent on hiding the truth. MMAR Group was a Texas securities firm that was the subject of a *Wall Street Journal* article reporting on an ongoing state and federal investigation into the propriety of the company's dealings with the Louisiana State Employees' Retirement System and the alleged reckless and extravagant use of client money.[23] One month after the article was published, and two days after being sued by the Louisiana retirement system, MMAR went out of business and thereafter brought a libel suit.[24] The firm was ruled to be a private figure, so in regard to its claim for actual injury, the *Sullivan* standard did not apply, although the firm was required to prove falsity and demonstrate negligence in accordance with the Court's post-*Sullivan* holdings[25] (which is, of course, more than would have been required by the common law). At trial, MMAR prevailed and was awarded compensatory damages of $22.7 million.[26] The firm also was awarded punitive damages under the *Sullivan* standard in the amount of $200 million against Dow Jones,[27] making this the largest verdict in the history of media libel cases.[28]

Dow Jones moved to set aside the verdict and for a new trial.[29] As to the compensatory damages claim, the court ruled without particular difficulty that the evidence was sufficient to support the jury's findings of falsity and negligence, and it upheld the

[21] Various efforts by the Nixon Administration to control or intimidate the press through legal means, including the issuance of subpoenas, prosecution of press sources, threats not to renew television licenses, and the imposition of prior restraints, are recounted in Professor David Anderson's article on freedom of the press. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 523 (2002).

[22] 987 F. Supp. 535 (S.D. Tex. 1997).

[23] Media Law Resource Center, MLRC 2004 REPORT ON TRIAL AND DAMAGES, Feb. 2004, at 63 [hereinafter MLRC 2004 REPORT].

[24] *Id*.

[25] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (placing burden on plaintiff to prove falsity); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (requiring, at minimum, that a private figure plaintiff prove negligence).

[26] *MMAR Group, Inc.*, 987 F. Supp at 538.

[27] *Id*. at 549.

[28] MLRC 2004 REPORT, *supra* note 23, at 63. **R**

[29] *MMAR Group, Inc.*, 987 F. Supp. at 536.

award.[30] Punitive damages were a different story. Here the heightened *Sullivan* standard applied, and the court found there simply was not enough evidence that Dow Jones had acted with actual malice.[31]

The proceedings in the trial court likely would have ended here but for an unexpected development bearing an eerie parallel to the events of Watergate. MMAR apparently had an extensive taping system that it used in connection with its business.[32] While Dow Jones's appeal was pending, the *Wall Street Journal* was approached by a former member of MMAR who disclosed that principals in the firm had withheld or destroyed various tape recordings of conversations that cast serious doubt on MMAR's claim that key parts of the *Journal*'s article was false.[33] As a result, the trial court reopened the case under Federal Rule of Civil Procedure 60(b)(3), vacated the verdict, and ordered a new trial on the grounds that MMAR's misconduct had seriously prejudiced the newspaper's ability to defend itself on the issue of falsity.[34]

So what does this case tell us about Watergate? First, it vividly demonstrates how much easier it is for someone intent on hiding facts that bear on the truth to prevail when *Sullivan*'s heightened protection is inapplicable. The issue of truth largely was in control of the plaintiff in the MMAR case, and but for the fortuity of a former member of the firm coming forward, Dow Jones would likely have been deprived of an important defense. Actual malice was a different matter. The facts surrounding that determination were within the sphere of Dow Jones's own knowledge, and it was able to defend itself more effectively regardless of what the plaintiff had done. Had *Sullivan* not eroded the common law, punitive damages likely would have been available under a very different and less stringent standard of common law malice, requiring only that the plaintiff demonstrate some kind of ill will or

[30] *Id*. at 538-42.

[31] *Id*. at 542-44. The court did find that the reporter acted with actual malice, but because most of the punitive award ran against Dow Jones and it had not authorized or ratified any wrongful conduct, the bulk of the award was thrown out. *Id*. at 544-45.

[32] *MMAR Group, Inc. v. Dow Jones & Co.*, 187 F.R.D. 282, 286-89 (S.D. Tex. 1999).

[33] *Id*. at 286.

[34] *Id*. at 282.

hostility.[35]

Getting back to Watergate, this might have meant, for example, that all of the *Washington Post*'s editorials critical of President Nixon and his administration were fair game to show the *Post*'s hostility.[36] Or equally troubling, had the *Post* continued aggressively to pursue the story after suit was filed, might the plaintiffs have been able to offer that fact as evidence in support of a punitive claim?[37] One can imagine that Woodward and Bernstein cajoled, pushed, and even threatened sources to dislodge the information they acquired, and one can only wonder how their tactics might have been viewed in a world without *Sullivan*, which makes this kind of argument largely obsolete.[38]

Second, questions like truth and common law malice do not ordinarily lend themselves to the kind of searching post-trial review that the *Sullivan* standard does. With *Sullivan*, unlike with the common law,[39] comes the requirement that actual malice be proved by clear and convincing evidence[40] and that reviewing courts conduct a searching independent review of the record to make sure the constitutional standard has been met.[41] The net effect of these differences is that plaintiffs seeking to use libel as a means to hide the truth would likely have had a greater chance of winning a verdict and defending it on appeal under the common law than they do with the *Sullivan* rule.[42]

These same concerns come into play even where someone is

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[35] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS, § 10.3.5 (3d ed. 2004)

[36] *Cf*. Corporate Training Unlimited, Inc. v. NBC, Inc., 981 F. Supp. 112, 124 (E.D.N.Y. 1997) (finding that reporter's alleged "ill will" had no bearing on the actual malice inquiry, which "refers to a defendant's knowledge of the falsity of the defamatory statements or a reckless disregard concerning their truth, not to any subjective ill will it may have borne the plaintiff").

[37] *Cf*. Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172, 186 (Ct. App. 1989) (holding that a finding of a reporter being aggressive and abrasive does not establish actual malice).

[38] *See id*.

[39] Where First Amendment rules are not involved, reviewing courts generally apply the more deferential "clearly erroneous" standard of review to questions of fact. *See* FED. R. CIV. P. 52(a); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 498-99 (1984).

[40] *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989).

[41] *See Bose*, 466 U.S. at 511.

[42] The MLRC study shows that between 1980 and 2003, almost half of all libel verdicts won by plaintiffs have been reversed or modified on appeal. *See* MLRC 2004 REPORT, *supra* note 23, at 45 tbl. 18. **R**

not trying to hide the truth, but instead the truth is simply in dispute. As Justice Harlan once pointed out, "[I]n many areas which are at the center of public debate 'truth' is not a readily identifiable concept."[43] Take, for example, the celebrated litigation in the 1980s between CBS and General William Westmoreland.[44] The General had sued CBS over a documentary suggesting that Westmoreland and the military had "cooked" enemy casualty figures during the Vietnam War.[45] The story was controversial and subject to a great deal of criticism.[46] In response, CBS conducted its own internal review of its reporting, concluding that a number of CBS policies had been violated in preparation of the report.[47] Nevertheless, CBS believed the report to have been essentially correct and stood by it.[48] Westmoreland then sued for libel.[49]

Westmoreland v. CBS has often been cited as an example of the inadequacies of the *Sullivan* rule. CBS was put to the enormous expense of an unnecessary trial on an issue about which our own government could not even agree during the war, and which in all likelihood was not subject to definitive proof either way.[50] This criticism is valid and does, in fact, highlight weaknesses in the *Sullivan* doctrine. But what might have happened without *Sullivan*? During trial, Westmoreland ultimately gave up and dismissed his case in return for what one of his lawyers has described as a "sort of wishy-washy statement about leaving everything to history."[51] This happened, of course, precisely because of the barriers imposed by *Sullivan*. Notwithstanding the serious criticisms identified by CBS in its own evaluation of the

43 Time, Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part).

44 Westmoreland v. CBS, 601 F. Supp. 66, 67 (S.D.N.Y. 1984).

45 *Id*.

46 *Id*.

47 *Id*.

48 *Id*. The *Westmoreland* case, including the events leading to the trial, is extensively and critically chronicled by Renata Adler in her book RECKLESS DISREGARD. *See generally* RENATA ADLER, RECKLESS DISREGARD (1986).

49 *See Westmoreland*, 601 F. Supp. at 67.

50 *See* LEWIS, *supra* note 19, at 609-11, 620. For another decision where the likely inability to prove definitively the truth or falsity of a broadcast redounded in the broadcaster's favor, see *Auvil v. CBS 60 Minutes*, 67 F.3d 816 (9th Cir. 1995). R

51 David Dorsen, Lecture at Duke University, *Westmoreland v. CBS*, at 8 (1998), *at* http://www.pubpol.duke.edu/centers/dewitt/papers/archive/27/27_2.doc (last visited Feb. 27, 2005); *see* BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER 12 (1999).

report, Westmoreland faced serious obstacles to success in his litigation, including proving falsity and actual malice.[52] Had the protections of *Sullivan* been unavailable, CBS would have had to prove truth—a difficult, if not impossible, undertaking—and it would not have been protected from liability by the argument that, despite the flaws, its report was broadcast only after a detailed and considered investigation. In these circumstances, it seems reasonable to suggest that Westmoreland might not have given up nearly so easily—or cheaply.

Finally, in the absence of *Sullivan*, consider how prominent or powerful figures might have used libel and other torts to suppress criticism about them. In the 1980s, Jerry Falwell was deeply offended by a parody published by Larry Flynt and *Hustler* magazine.[53] The parody and the publication were without doubt offensive, and Falwell sued both for libel and intentional infliction of emotional distress.[54] A jury ruled in Falwell's favor on the emotional distress claim,[55] and but for the Court's extension of the *Sullivan* principle to that claim, he likely would have succeeded.[56] One of the key arguments advanced in the various amicus briefs and adopted by the Supreme Court was the potential for claims such as Falwell's to deter political criticism, particularly in the form of editorial cartoons and the like.[57] Just recently we have seen a striking example in Canada, which of course has rejected the *Sullivan* standard,[58] of how those kinds of concerns can operate. Conrad Black, the fallen Canadian media baron who has been the subject of a great deal of critical reporting both in the United States and elsewhere[59] over the collapse of his publishing empire, has sued *Toronto Life* magazine over an article entitled "A Toast to Lord Black on His Arrival in Hell," which was illustrated with a drawing of him pulling into Hades in

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[52] *See Westmoreland*, 601 F. Supp. at 68.

[53] Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988).

[54] *Id*. at 48-49.

[55] *Id*. at 49.

[56] *See id*. at 52-53.

[57] *Id.* at 53-55.

[58] Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, *51 n.211 ("[T]here is no need to amend or alter the common law . . . the 'actual malice' rule adopted by the U.S. Supreme Court in *New York Times Co. v. Sullivan* . . . should not be adopted into the Canadian common law of defamation.").

[59] *See, e.g.*, Canadian Broadcasting Company, *Conrad Black: Lager-heir to London lord*, Nov. 13, 2003, *at* http://www.cbc.ca/news/background/black_conrad (last visited Feb. 27, 2005).

a convertible, and giving a thumbs up to those with whom he would soon be suffering.[60]

The point of all this is not to demonstrate that *Sullivan* is perfect—it isn't—or even that it works well most of the time. It has, however, had a profound, and in my view positive, impact in protecting many forms of valuable expression which, under the common law, or even a less protective constitutional standard, might have been subject to considerable liability. And as I now shift my perspective to look at how *Sullivan* is working today, I do not want to give the impression of understating its importance or its benefits.

II

THE BAD

It is easy to forget that the serious debate in the *Sullivan* decision was not over whether instituting an actual malice standard would provide too much protection for the press, but rather whether that standard provided too little. The Court's decision in favor of the *New York Times* and the individual defendants was unanimous. Three Justices—Black, Douglas, and Goldberg—concurred that any rule allowing government officials to sue for libel did not go far enough.[61] One of their principal concerns was that the risks and costs associated with the litigation process itself would have a significant deterrent effect on expression.[62] The experience of the last twenty-five years shows that these Justices were prescient.

A. Mega Verdicts, Pricey Lawyers, and Beyond

The Media Law Resource Center (MLRC), a media industry trade group, has tracked media libel trials since 1980.[63] When the tracking began, it was generally acknowledged that media libel litigation had reached crisis proportions as the result of "a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering

[60] *See* Mark A. Stein, *And the Retort: Go to Court*, N.Y. TIMES, Sept. 19, 2004, Business Section at 2.

[61] *See* New York Times v. Sullivan, 376 U.S. 254, 293 (Black, J., joined by Douglas, J., concurring); *id*. at 297 (Goldberg, J., joined by Douglas, J., concurring in the result).

[62] *See id*. at 294-95 (Black, J., concurring); *id*. at 302-03 (Goldberg, J., concurring).

[63] MLRC 2004 REPORT, *supra* note 23, at 1. **R**

sums of money."[64] The ongoing study now contains data on 503 libel trials over a twenty-five year period,[65] and although the current state of affairs does not seem quite so acute, serious concerns remain.

Over the period, plaintiffs have prevailed just under sixty percent of the time even where the elevated *Sullivan* standard applies.[66] In all trials, the average damage award has been just over $2.25 million, with a median of $300,000.[67] While it is true that many of these initial verdicts are reversed or modified on appeal, this is not always the case.[68] Eight of the ten largest verdicts against the media arose out of libel cases, and within this group of eight, five involved news reporting on government or some other public issue.[69] These five verdicts ranged from just over $19 million to $222.7 million, and three of them were sustained on appeal.[70]

In *Sprague v. Walter*,[71] an assistant district attorney in Philadelphia was the subject of four articles in the *Philadelphia Inquirer* which, among other things, suggested that Sprague obstructed a homicide case to permit the son of a friend to escape prosecution, and also interfered with an investigation of Pennsylvania state police officers.[72] A jury found in favor of Sprague, a public official under *Sullivan*, and awarded him $2.5 million in compensatory damages and $31.5 million in punitive damages.[73] The appellate court affirmed the verdict, left the compensatory award intact, and remitted the punitive award to a mere $21.5 million.[74] Thereafter the case was settled for a re-

64 Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983); Ollman v. Evans, 750 F.2d 970, 996-97 (D.C. Cir. 1984) (Bork, J., concurring); Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart,* 35 AM. U. L. REV. 3, 24-28 (1985).

65 MLRC 2004 REPORT, *supra* note 23, at 1. R

66 *Id.* at 23 tbl. 5.

67 *Id.* at 28 tbl. 8. These figures exclude *MMAR Group, Inc. v. Dow Jones & Co*., 987 F. Supp. 535 (S.D. Tex. 1997), which, as discussed above, represents the largest verdict in history. MLRC 2004 REPORT, *supra* note 23, at 63. If *MMAR Group, Inc.* is included, the average jumps to over $3 million, but the median does not change. *Id*. at 28 tbl. 8. R

68 *See* MLRC 2004 Report, *supra* note 23, at 45 tbl. 8.

69 *See id*. at 63-68.

70 *Id*.

71 656 A.2d 890 (Pa. Super. Ct. 1995).

72 *Id*. at 897.

73 *Id*. at 896.

74 *Id*. at 930.

ported $20 million.[75]

In a similar vein is *Feazell v. A.H. Belo Corp*.,[76] another case involving a district attorney, this time originating in Texas. In *Feazell*, a Dallas television station aired a report that the plaintiff was lax in prosecuting drug cases and may have taken bribes in drunk-driving cases.[77] Two years later, the plaintiff was indicted on federal racketeering and bribery charges, was tried, and was acquitted.[78] Thereafter he resigned, went into private practice, and sued the television station for libel.[79] The jury awarded him $58 million, and the case was settled prior to appeal.[80]

The third case, *Srivastava v. Harte-Hanks*, was brought by a heart surgeon named Srivastava after a television station reported that his hospital privileges had been revoked and that he may have mishandled several cases.[81] After the jury awarded him $29 million in compensatory and punitive damages, the case was settled before appeal for $8.5 million.[82]

Of the two cases where verdicts were reversed, one, *MMAR Group, Inc.*, was initially sustained as to the $22.7 million compensatory damages award, but later was dismissed when, fortuitously, the defendant learned that plaintiff had withheld or destroyed critical evidence.[83] Only one of the five largest verdicts was dismissed outright on appeal.[84]

If these cases involved media conduct that was exceptionally bad, where there was clear evidence of calculated falsehood, one might be tempted to ignore or at least diminish the experience as aberrational. Particularly troubling is that in each of these cases, the huge verdicts were sustained under circumstances where one can at least reasonably question whether the applicable standards were satisfied. In *Sprague*, for example, the case for actual malice centered not on any hard evidence of calculated falsehood,

[75] SANFORD, *supra* note 51, at 175. **R**

[76] Feazell v. A.H. Belo Corp., No. 86-22271 (Tex. Dist. Ct., Apr. 19, 1991).

[77] MLRC 2004 REPORT, *supra* note 23, at 63. **R**

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] *Id*. at 65.

[82] *Id*.

[83] 987 F. Supp. 535, 538 (S.D. Tex. 1997).

[84] *See* Newton v. NBC, Inc., 930 F.2d 662 (9th Cir. 1990). NBC's victory here came at a considerable price; legal fees to defend the case are reported to have amounted to $9 million. *See* DONALD M. GILLMOR, POWER PUBLICITY AND THE ABUSE OF LIBEL LAW 130 (1992).

but rather on the alleged animosity the reporter harbored against the plaintiff and certain personal problems the reporter had endured.[85] Although the *Feazell* decision was not appealed, and there is no reported decision, it is interesting to note that a finding of actual malice was made notwithstanding that after the report was broadcast a prosecutor thought the evidence strong enough to justify an indictment and trial.[86] In *MMAR*, the subsequently discovered evidence strongly suggested that the most critical defamatory statements had actually been true,[87] while in the *Shrivastava* case, much of the reporting was based on confidential medical reports that had been secretly given to the reporter by the defendant's secretary.[88] This is not to suggest that the reporting in these cases was without problems, but it certainly was not indefensible, whereas true calculated falsehood is.

Verdicts, of course, do not tell the whole story of the risks associated with libel litigation after *Sullivan*.[89] Even where the defendant is largely successful, the success often comes at a very high price.[90] Defense of the *Westmoreland* case discussed earlier is reported to have cost CBS more than $3.5 million in attorneys' fees.[91] *The Washington Post* is reported to have spent around $2 million defending itself against a libel case brought by former Mobil Oil president William Tavoulareas.[92] NBC is said to have spent $9 million defending a libel suit brought by the entertainer Wayne Newton.[93] More recently, ABC settled a libel case brought by tobacco companies over a story reporting that they

[85] Sprague v. Walter, 656 A.2d 890, 908 (Pa. Super. Ct. 1995). It is also noteworthy that the *Sprague* case arose out of an article published by one of the most respected newspapers in the country, *The Philadelphia Inquirer*, which, at the time, was edited by one of the newspaper industry's most highly regarded editors, Eugene Roberts. *See* SANFORD, *supra* note 51, at 98. Roberts himself played a role in the articles concerning Mr. Sprague. *See Sprague*, 656 A.2d at 908. R

[86] *See* MLRC 2004 REPORT, *supra* note 23, at 63. R

[87] *See* MMAR Group, Inc. v. Dow Jones & Co., 187 F.R.D. 282, 288-89 (S.D. Tex. 1999).

[88] MLRC 2004 REPORT, *supra* note 23, at 65. R

[89] For a comprehensive examination of the risks and costs associated with libel litigation—both as to plaintiffs and defendants—see Anderson, *supra* note 4, at 510-36. R

[90] *See* Levine, *supra* note 64, at 28-32. R

[91] *See* Anderson, *supra* note 4, at 542 n.218. Estimates of the costs in Westmoreland's case run as high as $10 million. *See* Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. REV. 529, 529 n.2 (1998). R

[92] SANFORD, *supra* note 51, at 4. R

[93] *See supra* note 61. R

had manipulated the level of nicotine in cigarettes during the manufacturing process. The case was settled when ABC agreed to pay the plaintiffs' attorneys' fees, which are reported to have been $15 million.[94]

Fees for outside counsel again do not tell the whole story. Over the last fifteen or so years there has been a significant change in the role of inside counsel as well. When I joined CNN in early 1991, I was the first CNN lawyer whose central responsibility was to clear stories before they aired. By the time I left the network in 2000, there were five lawyers (in addition to me) who focused on pre-broadcast review. In my experience, CNN was not unusual; other television news operations had as many if not more lawyers clearing stories in advance of broadcast, and print organizations also have a bevy of counsel reviewing stories before publication.[95] There is, of course, a significant cost issue associated with employing all of these lawyers, but that is not the only change. When I first started practicing in this area, it was generally acknowledged that lawyers were not editors and should stay out of the editorial process. Over the years, I heard less and less about this separation, and my sense is that lawyers today are far more involved in the editorial process than they used to be.[96] While this may be a good thing for minimizing liability,[97] I am not so sure it is a good thing for journalism.[98]

B. Why We Should Care

There is a temptation to dismiss all this as something the media

[94] *See* Frontline, *Anatomy of a Decision*, *at* http://www.pbs.org/wgbh/ pages/ frontline/smoke/cron.html (last visited Feb. 27, 2005).

[95] For example, every issue of *Time* is read cover-to-cover by a lawyer before it is published.

[96] *See* Neil Hickey, *The Lawyers: How They Can Help Us, How They Can Hurt Us*, COLUM. JOURNALISM REV. Sept./Oct. 2000, at 1 ("Now more than ever, lawyers are becoming part of the editorial process.").

[97] As to the liability side, the MLRC study suggests that in the 1990s the media did better in litigation than it did in the 1980s, and since 2000 it appears to be doing better than it did in the 1990s, although there is not enough data yet to draw strong conclusions on this latter point. I suspect there are many reasons for this, including a more active and extensive role for counsel in the pre-broadcast or pre-publication review process.

[98] *See* David A. Anderson, *Libel and Self-Censorship*, 53 TEX. L. REV. 422, 438-41 (1975) (discussing "personal and professional factors that tend to make the lawyer a poor censor"); Hickey, *supra* note 96, at 1-5 (discussing how lawyers can affect journalism). The Supreme Court's admonition in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), that editors, not judges, should determine what goes into a newspaper would seem to apply with equal force to lawyers. R

has brought upon itself. Over the twenty-five years covered by the MLRC study, American news media has become increasingly concentrated in the hands of big, powerful, and profitable companies that, it can be said, are able to afford these costs and are unlikely to be deterred by verdicts and attorneys' bills which pale in comparison to the companies' revenues and net worth.[99] To make matters worse, one can certainly make a case that in general the quality of reporting has not been on the rise. Over the last decade, or more, we have seen continuing erosion of the distinction between news and entertainment[100] and between news and advertising.[101] The public views news organizations as excessively focused on prurient, salacious, or sensational stories to the detriment of more important but less exciting or titillating reports (although, of course, the public may not be as interested in reading about or watching reports on these more serious issues). The media certainly does not help itself when, for example, it acts as if there is nothing more important in the world than what happened at the O.J. Simpson trial—or more recently, Michael Jackson's fiasco du jour.[102] And the current fascination with "reality" television, while a ratings booster, certainly does not inspire us to shout the words of the First Amendment from our rooftops.[103]

Nevertheless, there are good reasons for not ignoring the risks

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[99] In *Don't Shoot The Messenger*, Bruce Sanford argues persuasively that the public's perception of the media as being more about making money than making good journalism is the key ingredient in the propensity of judges and juries to reject First Amendment defenses and award sizeable verdicts to plaintiffs in libel cases. *See* SANFORD, *supra* note 51, at 93-112. R

[100] *See, e.g.*, Smolla, *supra* note 64, at 11 (describing as one factor in the proliferation of libel litigation, "the increasing difficulty in distinguishing between the informing and entertaining functions of the media"); Broadcasting and Cable, *News for Sale?*, Jan. 26, 2004 (discussing NBC offer for interview with Michael Jackson as "newsfotainment"). R

[101] *See, e.g.*, David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 460-66 (2002); Stuart Elliott, *Advertising*, N.Y. TIMES, Feb. 11, 2004, at C12 (discussing appearance of sponsors' products on CNN news program).

[102] *See* SANFORD, *supra* note 51, at 39-45. R

[103] One particularly disastrous manifestation of the reality craze that has done little to enhance the public's view of the press has been the recent experience with media ride-alongs, where the press accompanies law enforcement onto private property during police or other official action. *See* SANFORD, *supra* note 51, at 123-49. R Courts have been highly critical of media ride-alongs. *See* Ayeni v. CBS, Inc., 848 F. Supp. 362, 368 (E.D.N.Y. 1994), *aff'd*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995). The Supreme Court has declared the practice to be a violation of the Fourth Amendment, at least where press entry on private property is involved. *See* Wilson v. Lane, 526 U.S. 603 (1999).

and costs that persist notwithstanding *Sullivan*, even if the media may at times be its own worst enemy. First, however one might generalize about American news media today, it is equally true that many of the large verdicts and expensive litigation we have seen involve important reporting. Reports like I discussed earlier on alleged political corruption, incompetent doctors, and dishonest money managers all involve serious issues of public concern.[104] Second, speech is not like most other products. A particular kind of car, for example, has certain basic characteristics that are relatively fixed, and the costs and benefits of producing it are subject to relatively precise measurement. On the other hand, the costs and benefits of producing and disseminating a particular piece of information are both more difficult to measure and to realize. With every newspaper edition, television news broadcast, or internet website, editors and producers face a wide range of daily choices about what to include or exclude, and without much notice might well tend to avoid reporting that which is likely to bring with it potential exposure to significant liability or defense costs. Noted First Amendment attorney Floyd Abrams has recognized how particularly insidious this problem is because it is so difficult to detect:

> If news organizations let up a bit, no one would ever know it—newspapers, screens would still be filled with news. The sort of reporting that is libel-risky is the sort of material that serves the public in a unique way. If the press lets up, I'm afraid the public will never know what it has lost.[105]

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[104] Speech on matters of public concern lies "at the heart of the First Amendment's protection." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (quoting First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 776 (1978)); *see* Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (discussing the settled "general proposition that freedom of expression upon public questions is secured by the First Amendment"); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) ("Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

[105] Fred W. Friendly, *After the Westmoreland Case: How Can the People Talk Back?,* WASH. POST, Feb. 20, 1985, at A21 (quoting Floyd Abrams); *see* Levine, *supra* note 64, at 30, n.125 ("It is, of course, impossible to document those instances in which the press declines to publish specific stories or investigate particular issues or events because of a fear of defamation litigation. Nevertheless, common sense, as well as the candid admissions of editors, reporters, and their counsel, all indicate that debate on public issues has indeed been dampened."); Anderson, *supra* note 98, at 429-38 (discussing immeasurable nature of press self-censorship due to threat of litigation); Michael Massing, *The Libel Chill: How Cold Is It Out There?*, COLUM. JOURNALISM REV., May/June 1985, at 31 (concluding after interviews with 150 editors, reporters, and press lawyers that "a chill has indeed set in").

Moreover, the economic value derived from any particular editorial decision is likely to be more diffused[106] than with other products, so a publisher may have less incentive to take risks than the distributor of more tangible products.[107] Third, libel law does not just apply to big media; it equally affects the small players as well: alternative newspapers, bloggers, or citizens protesting the actions of their governors or others in a position of power.[108] Indeed, in agreeing to review this term its first libel case in fourteen years,[109] the Supreme Court will consider the propriety of an injunction against a disgruntled former client who was found to have defamed the prominent lawyer Johnnie Cochran through public protest.[110]

C. What Went Wrong?

What is it then about the *Sullivan* standard that permits this state of affairs to persist? There are numerous possible explanations,[111] but I propose to focus on two: the difficulty in determining when *Sullivan* applies in the first place and problems in the application of the actual malice standard itself.

1. Nailing the Jellyfish

The *Sullivan* case started us down the road of distinguishing between libel plaintiffs based on their government status or prominence in controversial social affairs. The law today provides that public plaintiffs—public officials and public figures—cannot prevail in a libel case without proving the *Sullivan* form

106 This is so because as a public good, "the benefits of information cannot be restricted to direct purchasers but inevitably spread to larger groups." Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558 (1991). The inability to realize the full economic value of particular speech is likely to lead publishers to produce less information than is socially optimal. *See id*. at 558-59.

107 *See id*. at 568-70.

108 *Cf*., Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (recognizing that First Amendment considerations apply to the "lonely pamphleteer . . . just as much as of the large metropolitan publisher"). The use of libel law to deter citizen protest was first documented by Professors Canan and Pring in their seminal study of what they dubbed Strategic Lawsuits Against Public Participation. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996).

109 The Supreme Court's last libel decision was *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496 (1991).

110 *See* Cochran v. Tory, No. B159437, 2003 WL 22451378 (Cal. Ct. App. 2003), *cert. granted*, 125 S. Ct. 26 (2004).

111 There is a great deal of in-depth scholarship on the causes of the increasing threat that libel has posed over the last twenty years. *See generally supra* note 4.

of actual malice, whereas, at least as to claims seeking compensation for actual injury, private plaintiffs are held to a far less demanding standard, usually negligence.[112] This determination, whether the plaintiff is public or private, is a critical question in any libel case, and can affect the entire course of the litigation.[113]

Unfortunately, notwithstanding its importance to any litigation, it is often quite difficult to predict with any certainty how a court will view a plaintiff. One court likened the determination to "nail[ing] a jellyfish to the wall."[114] The leading treatise on the subject describes the law as "chaotic."[115]

Sullivan itself was not so much concerned with the status of the plaintiff as it was with the underlying importance of safeguarding "a profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide open."[116] It was only later that the distinction between public and private plaintiffs began to crystallize, and for a time the Court appeared to be moving in a different direction. Two years after the *Sullivan* decision, the basic rule of the case was extended to prominent plaintiffs who were not government officials—individuals the Court deemed public figures.[117] Shortly thereafter, a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*[118] determined that the *Sullivan* actual malice standard should apply to all reporting on matters of public or general concern.[119] Several years later, however, a majority of the Court in *Gertz v. Robert Welch, Inc*.[120] rejected this approach, firmly establishing the distinction between public and private libel litigants.[121]

This might have been fine had the court approached the public/private distinction broadly in a way that comported with the underlying values of *Sullivan*. Unfortunately, it has not. Instead, the Court has taken a "narrow and rigid approach"[122] to the dis-

112 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

113 *See* SACK, *supra* note 35, § 5.4.2. **R**

114 Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd,* 580 F.2d 859 (5th Cir. 1978).

115 SACK, *supra* note 35, § 5.3.1. **R**

116 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (emphasis added).

117 Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

118 403 U.S. 29 (1971).

119 *See id*. at 44-45.

120 418 U.S. 323 (1974).

121 *See id*. at 347-48.

122 Smolla, *supra* note 64, at 54. **R**

tinction, applying *Gertz* in a "dismally mechanistic"[123] way which has sown confusion in the lower courts. In at least two of its three public-figure cases decided since *Gertz*, the Court has refused to accord public-figure status under circumstances clearly implicating precisely the kind of issues that are at the heart of *Sullivan*.[124]

Wolston v. Reader's Digest Association arose from a book entitled *KGB: The Secret Work of Soviet Secret Agents*, which listed the plaintiff, Ilya Wolston, as one of a group of "Soviet agents identified in the United States" who had been "convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments."[125] The basis for the charges was an espionage case Wolston had become embroiled in involving his aunt and uncle.[126] In that case Wolston was subpoenaed, failed to appear, and ultimately was held in contempt for his failure.[127] The book was in error in reporting that Wolston had been indicted for espionage.[128] Despite the subject matter of the book involving an issue of vital public concern and Wolston's activities being related to that issue, the Court held that he was not a public figure.[129] In *Hutchinson v. Proxmire*,[130] the issue, though not nearly so weighty, still concerned the operation of government. A scientist who sought and received federal grant money to study emotional responses in certain kinds of animals was the unhappy recipient of Senator William Proxmire's "Golden Fleece of the Month Award," which targeted what the senator viewed as wasteful public spending.[131] Again, notwithstanding the direct relationship of the subject matter to a core function of government, the Court rejected public figure status for Hutchinson.[132] These cases are difficult to reconcile with *Sul-*

[123] *Id.* at 51.

[124] In my view, the Court's third public-figure decision is also highly debatable. But since it involved issues that arguably are further removed from *Sullivan*, I do not include it. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Smolla, *supra* note 64, at 51-54. R

[125] 443 U.S. 157, 159 (1979). The correct title of the book is *KGB: The Secret Work of Soviet Secret Agents*. The Supreme Court in *Wolston* misidentified it as *KGB, the Secret Work of Soviet Agents*. *See id*.

[126] 443 U.S. at 161-62.

[127] *Id*. at 162-63.

[128] *Id*. at 160.

[129] *Id*. at 166-68.

[130] 443 U.S. 111 (1979).

[131] *Id*. at 114.

[132] *Id*. at 133-36.

livan. Both concerned important public issues—espionage and wasteful government spending—and both involved plaintiffs who were undeniably involved in those issues, however reluctantly.

Not only do these decisions represent a cramped view of *Sullivan*, but they demonstrate another problem with the public/ private distinction: it often bears little relationship to how reporters actually do their jobs. Although some kinds of stories may be chosen precisely because of the plaintiff's prominence in society,[133] reporting is more often driven by reader or viewer interest and the importance of an issue to the audience. Whatever its shortcomings, however, this distinction has become firmly entrenched in the constitutional law of defamation, and there is little prospect that the Court would be willing to reconsider the wisdom of its approach. Nevertheless, I offer a modest suggestion that in some instances might reduce the tension between *Sullivan* and the Court's more recent approach to libel.

a. Neutral Reporting

My suggestion involves a doctrine know as the neutral reportage privilege, which was first articulated by the Second Circuit in *Edwards v. National Audubon Society*[134] to protect, without regard to a publisher's motivation, the disinterested reporting of defamatory accusations involving an issue of public concern leveled by a credible source and attributed to that source. As applied by the Second Circuit, the privilege was limited to accusations against a public official or figure, but it has been applied more broadly to private figures as well.[135] The privilege has not been widely adopted and, in fact, has been rejected by several courts.[136] Nevertheless, one leading scholar has remarked that in the right circumstances, most jurisdictions would likely apply it.[137]

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[133] Celebrity gossip reports on, for example, Britney Spears' latest marriage or Courtney Love's public outbursts are certainly driven by public interest in particular personalities, not the importance of the underlying issues. Ironically, though, notwithstanding that this kind of reporting involves issues of less importance than those involved in cases like *Wolston* and *Proxmire*, most of the celebrities subject to gossip reports are public figures. *See generally* SACK, *supra* note 35, § 5.3.11.1. **R**

[134] 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

[135] *See* April v. Reflector-Herald, Inc., 546 N.E.2d 466, 469 (Ohio Ct. App. 1988).

[136] *See, e.g.,* Dickey v. CBS, 583 F.2d 1221 (3d Cir. 1978); McCall v. Courier-Journal, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); Hogan v. Herald Co., 444 N.E.2d 1002 (N.Y. 1982).

[137] Anderson, *supra* note 4, at 503-04 (explaining that, for example, courts would **R**

The concept of neutral reportage was designed to solve the problem created by *Sullivan*'s actual malice standard when the press simply reports allegations that are newsworthy but which the publisher may not believe to be true.[138] Under *Sullivan*, such reporting, which is commonplace, could be subject to liability because, absent constitutional protection, the common law imposes the same liability on a republisher as it does on the originator of a defamation.[139] In some form, it seems to me, neutral reportage might offer a sort of middle ground between *Rosenbloom* and some of the more cramped post-*Gertz* public figure cases without signaling a return to the now-discredited broad notions of *Rosenbloom*. First, unlike the public figure-private figure distinction, neutral reportage focuses squarely on the core responsibility of the press to report on matters of public concern.[140] The press does this all the time without regard to whether the underlying accusations are true, and in many contexts it does so without any fear of liability. Reporting on court proceedings, the conduct of public meetings, and a host of other government activities all involve the press function of informing the public about what is being said by others about a particular subject or controversy. Libel law widely recognizes a privilege to make fair and accurate reports on such matters regardless of whether the press actually believes the charges or whether they are made about a person who is prominent or engaged in public affairs.[141] It does so because of a belief in the underlying importance of the public's knowing about these kinds of public issues, not because of any confidence that the reported accusations are true or made by a responsible person. Indeed, so fundamental is this belief that the fair-reports privilege is now likely required by the First Amendment.[142]

It does not seem like a big leap to get from the idea that we should permit accurate and neutral reporting on government affairs to the idea of shielding similar kinds of reporting on important public issues that may not so directly involve the

"surely" hold that the media could safely report a baseless allegation by the President of the United States that the Vice President was plotting to assassinate him even if the publisher did not believe the charge).

138 *See Edwards*, 556 F.2d at 120.

139 *See* SACK, *supra* note 35, §2.7.1. **R**

140 *See Edwards*, 556 F.2d at 120.

141 *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977).

142 *See* Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

government. This is particularly so in a society like ours, which values private enterprise above government assistance, and which is more willing to trust to the private sector matters that in other places are more heavily infiltrated by government.[143] It is certainly true that there are interests involved in reporting on government proceedings that do not necessarily apply to the private sector, but this is not always the case, and appropriate development of the neutral reportage concept could account for these differences. Without recognition of some form of neutral reportage, we will likely continue to see the kind of strange results wrought by the Pennsylvania Supreme Court's latest libel decision.

This decision, *Norton v. Glenn*[144], arose out of offensive and outrageous remarks made by one town council member about the town's mayor and the president of the council.[145] The statements were made both during council meetings and outside of the council chamber.[146] The outbursts were reported, in context, by the local newspaper, which also quoted the mayor as describing the comments as bizarre and suggesting that the person uttering them needed help.[147] The mayor and council president sued both the council member who made the statements and the newspaper for libel, but only in regard to the statements made

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[143] For example, retirement savings and health care in the United States are to a greater extent handled through private sector transactions than in many other countries. Yet these issues are of no less vital concern to the public here than they are elsewhere. *Cf*. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring), explaining that:

> Increasingly, in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds . . . . While these trends and events have occasioned a consolidation of governmental power, power has also become more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government.

[144] 860 A.2d 48 (Pa. 2004).

[145] The remarks included charges that the council president and mayor were "queers" and "child molesters," that they had conducted a homosexual affair, and that they had made inappropriate sexual overtures to and conspired against the council member defendant. *Id*. at 60 (Castille, J. concurring).

[146] *Id.* at 50.

[147] *Id.*

outside the council chamber.[148] The remarks made during counsel meetings were clearly not actionable as to the newspaper because of the Pennsylvania fair reports privilege.[149] The trial court held that neutral reportage applied to the newspaper's report and a jury returned a verdict against the council member but in favor of the newspaper.[150] The originator of the defamation did not appeal. The subjects appealed as to the newspaper only. Rejecting the neutral reportage doctrine, the superior court reversed the jury verdict, and the Pennsylvania Supreme Court affirmed that ruling.[151] The odd state of affairs—and the constitutional deficiencies—created by this reversal were aptly summarized in Justice Castille's concurring opinion:

> I am concerned also with the practical difficulties the press will encounter in trying to walk the very fine line between accurately reporting public governance—related comments such as these, while avoiding liability for doing so. Absent a privilege, the newspaper may be forced to sanitize the report or resort to vagaries—highly subjective changes which inevitably will operate to mislead the public as to the seriousness or rashness of the accusations. Moreover, by forcing newspapers to recharacterize what actually occurred, the absence of a privilege essentially requires the substitution of editorial opinion for accurate transcription. Such a transformation of the actual event inevitably alters its context and content. In addition to being inaccurate, news reports altered for fear of litigation would be of far lesser value to the general public in learning of and passing upon the appropriateness of the public behavior of their elected officials. Such a stilted reporting regime would contravene the United States Supreme Court's seminal statement that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[152]

My aim here is not to define with precision how the neutral

148 *Id*.

149 *See id*. at 63 (Castille, J., concurring).

150 *Id.* at 51.

151 Although purporting to reject neutral reportage because it believed the United States Supreme Court would not adopt such a privilege, the court's articulated reasoning was based only on the absence of any decision by the Supreme Court in favor of adopting the doctrine. *See id*. at 53-57. Of course, the same thing could have been said about actual malice before *Sullivan* was decided, and the absence of any decision on the point hardly constitutes a basis for rejection.

152 *Id*. at 60 (Castille, J., concurring). Regrettably, Justice Castille did not follow his own reasoning to its logical conclusion. Instead, he concurred in the result by passing the proverbial judicial buck, reasoning that such a privilege "should originate with the High Court." *Id*.

reportage privilege might work in all cases, but only to suggest that if we are truly serious about the values embodied in *Sullivan*, it is an approach that should be considered in the right circumstances.

2. The Hot Dog Factory

The second problem with *Sullivan* has to do with the inconsistent and often flawed interpretation and application of the actual malice standard. To understand why this is so, it may be helpful first to consider the similarities between journalism and hot dogs. Both involve something that at least many of us want to consume—both nourish us and satisfy certain basic psychic needs. Yet it may also be true that we don't want to know too much about how either is made. Unfortunately, however, the *Sullivan* actual malice standard forces us to spend a good deal of time looking at how journalism is made, which isn't always pretty and often may lead to the wrong considerations influencing the outcome of a case.

Justice Brennan clearly intended the actual malice standard to be limited to very bad conduct—conduct amounting to "calculated falsehood"[153]—and in the early years after *Sullivan*, the standard appeared to be applied that way.[154] More recently, however, despite using language that sounds true to the original understanding of *Sullivan*, courts often transform the inquiry into something that more resembles a general bad conduct and elevated professional malpractice standard. Impetus for this approach has come from *Harte-Hanks Communications, Inc. v. Connaughton*,[155] the Court's most recent pronouncement on *Sullivan*'s actual malice standard. The *Connaughton* Court reviewed a Sixth Circuit decision finding actual malice based largely on two circumstances: that the newspaper's publication was an "extreme departure from professional standards" and was motivated by a desire to support a particular political candidate and gain an advantage over a competing newspaper.[156] Although appearing to reject these considerations as alone insufficient to establish actual malice, the Court affirmed the decision below because when "read as a whole, it is clear that the conclu-

[153] Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
[154] *See* St. Amant v. Thompson, 390 U.S. 727 (1968); *Garrison*, 379 U.S. at 75.
[155] 491 U.S. 657 (1989).
[156] *Id*. at 664-65.

sion concerning the newspaper's departure from accepted standards and the evidence of motive were merely supportive of the court's ultimate conclusion" that the record supported a finding of actual malice.[157] The Court continued by admonishing courts to "be careful not to place too much reliance on such factors," but at the same time acknowledged that a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence.[158]

Although the ultimate decision in *Connaughton* may well be correct, and its language not particularly objectionable in the abstract, I am not so sure that lower courts have really taken to heart its admonition that they be cautious in using such evidence as indicative of actual malice. Nor am I particularly surprised. After all, the *Sullivan* standard asks courts and juries to swallow a bitter pill, and so it should not come as a shock that a gag reflex often ensues. But, do we really believe, as the MLRC study demonstrates, that in six of every ten tried libel cases the media intentionally published a calculated falsehood?[159] If we do, it is certainly a sad commentary on the current state of journalism—too sad, in fact, for me to accept without a good deal more evidence than I have seen in my twenty-five years of working with the press. A more likely explanation is that juries and judges are somewhat understandably, yet unduly, influenced by some combination of a general dislike of the media, disapproval of some of the hot-dog-like manufacturing processes that they see in connection with the development and production of news reports, and a sense that the press gets away with too much. Bruce Sanford, in his book *Don't Shoot The Messenger*, reviews the sources of much of this general public revulsion and reveals this candid and chilling observation by one respected former federal judge:

> A feeling is abroad among some judges that the Supreme Court has gone too far in protecting the media from defamation actions resulting from instances of irresponsible journalism . . . . I've been a judge for 15 years, and now that I've taken off my robes, one of the first things I must say is—Watch Out! There's a backlash coming in First Amendment doctrine.[160]

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[157] *Id*. at 667-68.

[158] *Id*. at 668.

[159] See *supra* note 42 and accompanying text. **R**

[160] SANFORD, *supra* note 51, at 190 (quoting Abner J. Mikva, *In My Opinion, Those Are Not Facts*, 11 GA. ST. U. L. REV. 291, 296 (1995)). **R**

Sanford also reported the attitude of one of the jurors who rendered a verdict of $220 million against the *Wall Street Journal*: "They need punishing."[161]

It is easy to forget that *Connaughton* involved circumstances that, at least as described by the Court, almost inexorably lead to the conclusion that the underlying report was seriously doubted by the newspaper: an obviously suspect source telling an improbable story denied by five other witnesses published by a newspaper which failed even to try interviewing the one witness most likely to support the source but whose denial would effectively kill the story. But the rather extreme facts underlying *Connaughton* do often seem to be forgotten, or ignored, in favor of a sort of circumstantial grab-bag that bears little relation to the kind of mendacious conduct envisioned by *Sullivan*. The most recent example of actual malice run amok is *Suzuki Motor Corp. v. Consumers Union of United States, Inc.*,[162] a Ninth Circuit decision reversing a district court's grant of summary judgment by finding a triable issue of actual malice.

The case arose out of Consumers Union's roll-over testing of various SUVs, including the Suzuki Samurai. Consumers Union concluded that the Samurai had a tendency to roll over too easily and rated the car unsatisfactory.[163] It reached this conclusion after conducting two sets of tests that put various vehicles through a series of sharp turns.[164] The second test was more demanding than the first and was instituted after the first test when the Samurai's driver made a steering miscalculation and almost tipped the car.[165] In the second, more demanding test, the Suzuki tipped up a few times, whereas the other vehicles tested did not.[166] At the risk of oversimplifying, Suzuki's actual malice claim revolved around two allegations: that Consumers Union had a preconceived bias against the Samurai[167] and that the more demanding test was designed to produce the results Consumers Union wanted.[168] The evidence concerning the first point consisted primarily of a few admittedly unfortunate comments made

161 SANFORD, *supra* note 51, at 174.
162 330 F.3d 1110 (9th Cir. 2003).
163 *Id*. at 1125-26, 1129.
164 *Id*. at 1127-29.
165 *Id*. at 1116 (Kozinski, J., dissenting).
166 *Id*.
167 *See id*. at 1115-19.
168 *See id*. at 1135.

by people involved in the testing such as: "If you can't find someone to roll this car, I will"; a cheer when the vehicle started to roll to the effect of "That's it. That looked pretty good"; and "All right Ricky baby" when the Samurai tipped up another time.[169] The second point was bolstered by Consumers Union's previous practice of using only the first of the two tests in vehicle evaluations and certain criticisms of its testing methods by the National Highway and Traffic Safety Administration.[170]

In short, Suzuki's challenge boiled down to a circumstantial argument that mixed evidence of bias with alleged professional malpractice to create an inference of actual malice, which a majority of the Ninth Circuit bought, but not without a stinging dissent by Judge Kozinski, who was joined by eleven members of the court.[171] The dissent's central point was that it is simply impossible to believe the plaintiff's theory because everything that might have been wrong with Consumers Union's testing was disclosed chapter-and-verse in a 6,500-word article.[172] That article explained in considerable detail, and accurately, how both tests had been conducted; why a second testing protocol had been added; and how all the cars performed in both tests, including that the Samurai alone tipped up several times.[173] Consumers Union even gave credit to the Samurai as being "actually more maneuverable" than the other vehicles in the first, less demanding test.[174] Certainly this cannot be the stuff of which actual malice is made. That eleven judges of a federal court of appeals could look at the same record and reach the opposite conclusion from an almost equal number of their colleagues alone seems to suggest that something is very wrong here.[175]

At the heart of *Suzuki* was a disagreement over how deferential a reviewing court should be in evaluating the plaintiff's evidence at the summary judgment stage. The majority treated the case as it would any other summary judgment motion, conducting a de novo review without any special sensitivity to the

169 *Id*. at 1118, 1135.

170 *See id*. at 1119-20, 1136-38.

171 *See id*. at 1111-23.

172 *See id*. at 1115.

173 *See id*. at 1115-16.

174 *See id*. at 1116.

175 Sharper Image Corp. v. Consumers Union of the United States, Inc., No. 03-4094, 2004 WL 2554451 (N.D. Cal. 2004) (dismissing claim against consumer on grounds that plaintiff could not prove falsity).

First Amendment values at stake.[176] The dissent took quite a different view, arguing for a more stringent review of the case than is ordinarily called for when First Amendment considerations are not involved.[177] This relatively esoteric issue is of significant consequence.

As I mentioned earlier, in addition to the prospect of sizeable verdicts, one of the great deterrents to robust expression in the wake of *Sullivan* is the ever-increasing burden of legal fees in defending these suits.[178] The more protracted the litigation, the greater the cost and the greater the likelihood that expression will be deterred out of a desire to avoid the expense. As the avoidance of such deterrence was a central rationale for *Sullivan*, it does not seem particularly radical to suggest that the available procedures be applied in a manner that is especially sensitive to these concerns.[179] The notion that we apply special rules when expression is involved is not limited to the law of defamation or to the press. The overbreadth doctrine, for example, is a creature of the First Amendment designed to protect speech in ways that would not be considered in other contexts.[180] Injunctions against speech are considered extraordinary remedies that will rarely be sustained,[181] and perhaps under some circumstances may even be disregarded if transparently invalid.[182] Moreover, the independent review doctrine at issue in the *Suzuki* case is not limited to libel law,[183] but if used appropriately in that context is one tool that could at least help to alleviate some of the unnecessary burdens that are associated with the current state of libel litigation.[184]

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176 *See Suzuki*, 330 F.3d at 1132-33.

177 *Id*. at 1113.

178 In his dissent, Judge Kozinski observed that Consumers Union had spent more than $10 million defending itself in *Suzuki* and one other case, whereas its two adversaries had spent more than $25 million. *Id*. at 1115.

179 *See* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1784-94 (1998).

180 *See* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

181 *See, e.g.,* New York Times v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

182 *See* Walker v. Birmingham, 388 U.S. 307, 315 (1967); *In re* Providence Journal Co., 820 F.2d 1342, 1346-47 (1st Cir. 1986).

183 *See, e.g.,* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567-68 (1995).

184 Professor Susan Gilles has recognized that the Court has been less than consistent in its development of special procedural rules in libel cases. *See* Gilles, *supra* note 179, at 1759-65. Another recent decision involving Consumers Union demonstrates how state anti-SLAPP statutes also can effectively reduce the burdens of libel R

III

THE UGLY

An alien reading *New York Times Co. v. Sullivan* upon its arrival on Earth might reasonably believe that the decision began to sound the death knell for using the law of libel to punish expression. The decision, after all, focused centrally on America's unhappy experience with the Sedition Act of 1798, effectively declaring after 163 years that it violated the First Amendment. In particular, the Court cited James Madison's report on the Virginia Resolutions of 1798 opposing the Sedition Act to the effect that: "[I]t is manifestly impossible to *punish* the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures."[185]

Proceeding from its analysis of this failed criminal statute, the Court drew an analogy to civil litigation, explaining that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[186] Finally, noting the size of the Alabama judgment, Justice Brennan's opinion concluded that "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[187]

As this newly arrived alien explored more thoroughly the United States and its court system, it quickly would have discovered that the grand promise of *Sullivan* has remained unfulfilled in this respect. Punishing speakers for expression deemed libelous is a practice that is alive and well in the United States forty years after *Sullivan*.

Most commonly this punishment takes the form of punitive damages that the MLRC found to have been awarded in more than half of all media libel cases tried since 1980 and that make up almost two-thirds of the total awards over that period.[188] The average punitive damages award since 1980 exceeded $2 million,

litigation through early termination. *See* Sharper Image Corp. v. Consumers Union of United States, Inc., No. 03-4094, 2004 WL 2554451 (N.D. Cal. 2004).

[185] New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (emphasis added).

[186] *Id*. at 277.

[187] *Id*. at 278.

[188] MLRC 2004 REPORT, *supra* note 23, at 35. **R**

and that excludes the $200 million award in the *MMAR* case.[189] Although the frequency and size of punitive awards appears to have moderated slightly over the last several years, the awards remain a significant concern.[190]

The other way of punishing libelous speech is through criminal prosecution. In the same year it decided *Sullivan*, the Supreme Court declared unconstitutional a Louisiana criminal libel statute because it did not require proof of *Sullivan* actual malice.[191] The Court did not categorically reject criminal libel,[192] however, and although prosecutions are relatively rare, they have yet to be retired to the same historical dustbin that holds the Sedition Act. Indeed, in another recent study, the MLRC documented seventy-seven actual or threatened criminal libel prosecutions since 1965 when the Court struck down Louisiana's criminal libel statute.[193] More troubling still is that most of these prosecutions arose from criticism of public officials and arguably involved politically motivated and selective prosecution.[194] Just last year, the publisher and editor of a small Kansas alternative newspaper were convicted of criminal libel for making the somewhat less than incendiary charge that the mayor lived outside the city limits in violation of a state law.[195] The conviction has now been affirmed on appeal in a decision giving scant attention to the First Amendment implications of the prosecution.[196]

In this, the fortieth year since the *Sullivan* decision, it is worth asking why this state of affairs persists. It seems to me that the time has come to own up to the tension between the First Amendment and these kinds of punitive responses to expression.

Criminal libel presents the easier case.[197] Only seventeen

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189 *Id*. The median for such awards was $300,000. *Id.*

190 *See id*. at 2-3.

191 Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

192 *See id*. at 75; Branzburg v. Hayes, 408 U.S. 665, 683 (1972).

193 MLRC BULLETIN, CRIMINALIZING SPEECH ABOUT REPUTATION: THE LEGACY OF CRIMINAL LIBEL IN THE U.S. AFTER SULLIVAN & GARRISON, at ii (2003) [hereinafter MLRC BULLETIN].

194 *Id.*

195 *See* Kansas v. Powers, 95 P.3d 1042 (Kan. Ct. App. 2004) (unpublished). The appellate court refused even to consider a media amicus brief on the First Amendment issues raised by the case. *See* Media Law Resource Center, MLRC MEDIA LAW LETTER 27 (Aug. 2004).

196 *Id.*

197 I refer here to general criminal libel statutes, not narrowly tailored laws falling into that category of expression which can be regulated pursuant to *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942). Nor do I include more targeted statutes such

states still have criminal libel laws,[198] and many of those laws clearly do not comport with the demands of *Garrison v. Louisiana*,[199] the Supreme Court's principal pronouncement on the subject. Only four states have actually amended their statutes in accordance with *Garrison*.[200] Although *Garrison* did not categorically condemn criminal libel as inconsistent with the First Amendment, it did reject as outdated the central rationale supporting such statutes, which was the avoidance of breaches of the peace.[201] If the rationale supporting criminal libel no longer is operative in modern society, it is fair to ask why we are still talking about these laws at all. Does the occasional and selective use of criminal libel for political purposes have any place in an ordered society that values free expression as ours does? The civil law of libel appears to remain a viable means of redress for many who are defamed, and as we have seen, it can exact quite a penalty itself, punitive damages aside. At the very least, we need to examine whether these kinds of laws continue to serve any useful purpose. I suspect they do not.

Punitive damages present a more complex question that deserves the kind of serious consideration that is beyond the scope of these remarks. Permit me a few observations, however.

Quite apart from *Sullivan*, the Supreme Court has of late begun to rein in excessive punitive damage awards as inconsistent with due process. Most recently, in two decisions, the Court outlined three factors to consider when assessing whether a punitive award satisfies due process: the reprehensibility of the defendant's conduct; the ratio of punitive damages to actual harm; and the relationship between a punitive award and the comparable criminal or civil penalties that could be awarded for similar misconduct.[202] These considerations have special relevance to claims such as libel that implicate the First Amendment.

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as bank libel laws, although I do not mean to suggest that I think these laws satisfy constitutional demands.

[198] MLRC BULLETIN, *supra* note 193, at 15. **R**

[199] 379 U.S. 64 (1964).

[200] MLRC BULLETIN, *supra* note 193, at 16. **R**

[201] *See* 379 U.S. at 69 ("[U]nder modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.") (quoting Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 924 (1963)).

[202] *See* State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am. v. Gore, 517 U.S. 559 (1996).

Evaluating the reprehensibility or outrageousness of a speaker's conduct is a perilous undertaking when First Amendment values are at stake. In *Hustler Magazine v. Falwell*,[203] the Supreme Court rejected such a standard in the context of a claim for intentional infliction of emotional distress, explaining that:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.[204]

At a time when the press is generally unpopular, the concern is acute that judges and juries will use punitive damages to express their disapproval with press institutions or with particularly unpopular views.

Problems also exist in terms of the ratio of punitive to compensatory damages generally awarded in libel cases and their relationship to comparable criminal penalties. When both compensatory and punitive damages are awarded, it is usually the case that the punitive award far outstrips that for compensation.[205] Large punitive awards also bear absolutely no relation to the comparable penalties available under criminal libel laws, which generally "provide for fines in relatively miniscule amounts."[206] This seems clearly at odds with the Court's admonition that punitive damage awards "should accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[207]

Since *Sullivan* was decided, many justices of the Supreme Court have expressed concern about the propriety of punitive

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[203] 485 U.S. 46 (1988).

[204] *Id.* at 55. Recently, Justice O'Connor observed that punitive damages can be used to "target unpopular defendants and punish selectively." Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 63 (1991) (O'Connor, J., dissenting). These considerations apply with special force to expression. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

[205] *See* MLRC 2004 REPORT, *supra* note 23, at 38 tbl.13C. R

[206] SACK, *supra* note 35, § 10.3.5 at 10-21; *see* MLRC BULLETIN, *supra* note 193, at 57-118. R

[207] *Gore*, 517 U.S. at 583 (quoting Browning Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989)). It is interesting to note that in making this observation, the Court drew on its review of the Alabama judgment in *Sullivan*. *See Gore*, 517 U.S. at 583 n.38.

damages either in libel cases or in the context of the First Amendment.[208] The reasoning in *Gertz* also brings into question the propriety of punitive awards in defamation cases:

> Juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views . . . . [J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship.[209]

Two states, including Oregon, have eliminated punitive damages in libel cases.[210] Perhaps it is time to do the same in the remaining forty-eight.

Conclusion

A measure of how far we have moved from the ideals of *Sullivan* can be found in the Supreme Court's most recent encounter with civil liability of the press for what it publishes: *Bartnicki v. Vopper*.[211] Whereas in *Sullivan* speech was a value to be protected above virtually all others, in *Bartnicki* it is a commodity to be weighed in relative terms with other important interests.[212]

Bartnicki involved a civil claim under state and federal wiretap laws that prohibited the dissemination of the content of illegally intercepted telephone conversations.[213] A radio station, through no wrongful action on its part, had obtained and broadcast such a conversation between two union officials involved in a heated labor dispute.[214] There was no claim that the station's broadcast was false; the only claim was that the dissemination violated the statutes' prohibitions against dissemination.[215]

Bartnicki was decided by a six-to-three vote. The majority opinion, read in isolation, appears reasonably protective of expression, holding that publication of true speech on a matter of public concern is not subject to liability absent a contrary need of the highest order.[216] The asserted contrary interest was privacy,

[208] *See* Sack, *supra* note 35, §10.3.5.2. **R**

[209] 418 U.S. at 350.

[210] *See* Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Wheeler v. Green, 593 P.2d 777 (Or. 1979).

[211] 532 U.S. 514 (2001).

[212] *Id*.

[213] *See id*. at 517.

[214] *See id*. at 518-19.

[215] *See id*. at 519.

[216] *Id*. at 528.

which in the particular context of the decision was found insufficient to override the interest in free expression.[217]

The weighing of speech interests reflected in *Bartnicki* is pervasive in today's First Amendment jurisprudence.[218] It was foreign to *Sullivan*, and eight years after that decision was still a concept so unusual that Justice Douglas was able to describe the notion as "amazing."[219]

If somewhere in the 1970s the idea that we should balance First Amendment rights against other kinds of contrary interests firmly inserted itself into the equation,[220] then the requirement that infringements on expression pass strict scrutiny at least "confine[d] the balancing process in a manner protective of speech."[221] But in *Bartnicki*, a concurring opinion by Justice Breyer displays what I view as a disturbing willingness to employ a far more pliable and uncertain kind of weighing.[222] According to these Justices, not only must speech be of public concern to trump the kinds of privacy interests implicated by *Bartnicki*, it must also be of unusual public concern—in this case a perceived threat of violence—and must be about someone whose interest in privacy is particularly low—in this case a public figure.[223] Because the vote of these two justices was necessary for the majority—the remaining three members of the Court having dissented[224]—it would appear that the concurrence might, in fact,

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217 *Id.* at 532-35.

218 *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n, 518 U.S. 727, 740-41 (1996).

219 United States v. Caldwell, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting). This is not to say that the idea of balancing First Amendment rights against other interests was a novel concept when *Sullivan* was decided. Justice Felix Frankfurter, for example, was a passionate advocate for balancing. *See* Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring) ("The demands of free speech . . . are better served by candid and informed weighing of competing interests . . . than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.").

220 Balancing became entrenched in defamation law in *Gertz v. Robert Welch, Inc*., 418 U.S 323, 343-44 (1974).

221 *Denver Area*, 518 U.S. at 784 (Kennedy, J., concurring in part and dissenting in part).

222 *See* Bartnicki v. Vopper, 532 U.S. 514, 535-41 (2001) (Breyer, J., and O'Connor, J., concurring). Justice Breyer explained the basis for his approach in remarks delivered in 2002 at New York University School of Law. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

223 532 U.S. at 536-40.

224 *See id*. at 541.

have some teeth.[225]

If it does, predicting the outcome of these cases could become a true adventure in creativity.[226] If a public concern standard has been criticized as too vague,[227] what are we to make of a test that adds to the mix the less-than-precise concept of "unusual" public concern? More fundamentally, because *Bartnicki* involved facts that were indisputably true, why are we talking about this anyway?[228] Can the privacy interests involved here really ever trump free speech where it involves an issue of public concern?[229] The answers will have to wait for more decisions by the

[225] *Compare* McKoy v. North Carolina, 494 U.S. 433, 463 n.3 (1990) (Scalia, J., dissenting) (explaining that, where an individual justice is needed for the majority, "the opinion is *not* a majority opinion except to the extent that it accords with his views"), *with id*. at 448 (Blackmun, J., concurring) ("[T]he meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative."); *cf*. Marks v. United States, 430 U.S. 188, 193 (1977) (superseded in part by statute on unrelated grounds as stated in *Armstrong v. Bertrand*, 336 F.3d 620, 628 (7th Cir. 2003)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

[226] Justice Kennedy in particular has explained the dangers of such a balancing approach, which lacks clear legal standards. These dangers include the subordination of long-term speech values to the "inequities of the moment," ad hoc balancing with its resulting confusion and lack of judicial discipline, and the lack of notice and fair warning to those who must predict how courts will respond to attempts to suppress their speech. *Denver Area*, 518 U.S. at 785-87 (Kennedy, J., concurring in part and dissenting in part). In his *Gertz* opinion, Justice Powell emphasized the need for "broad rules of general application" to avoid "unpredictable results and uncertain expectations." 418 U.S. 323, 343-44 (1974). Professor Smolla has also written persuasively about the shortcomings of balancing as a means of deciding First Amendment problems. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 39-42 (1992) (explaining that "[o]n the whole, however, the use of the balancing approach tends to result in relatively low protection for speech, because when balancing is employed, speech tends to be devalued as just another social interest to be considered in the mix").

[227] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78-87 (1970) (Marshall, J., dissenting).

[228] Although the Court has refused categorically to rule out the possibility that some interest might be sufficiently strong to support restricting speech in this context, it has made clear that this would "seldom" be the case. *See, e.g.,* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979).

[229] In cases decided during the *Sullivan* era, the only kinds of interests considered as potentially strong enough to justify restrictions on speech were themselves constitutionally based. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (right to a fair trial); *see also* New York Times Co. v. United States, 403 U.S. 713 (1971) (national security). The Court has not recognized a general right of privacy in the Constitution, nor has it found a more specific right of telephone privacy outside the context of the Fourth Amendment. *See* Katz v. United States, 389 U.S. 347, 350-51

Court, or at least a more considered examination than I have opportunity to conduct in this forum. These questions do, however, lead me back to where I began: Do we feel lucky? It is unfortunate that forty years after *Sullivan*, we still need to ask this, but that we do suggests the answer is in some doubt.

(1967). Beyond specific constitutional guarantees—for example, the Fourth Amendment's prohibition against unreasonable searches and seizures by the government or the First Amendment's protection of associational privacy—the Court's recognition of broader constitutionally-based privacy interests has generally been limited to intimate and personal decisions in areas such as procreation, sexual conduct, marriage, and education. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573-74 (2003); *Katz*, 389 U.S. at 350-51.