A Suggestion to End the Struggle Over Libel

by Jay Bender*

The constitutionalization of the law of libel has travelled a tortuous path since 1964. In *New York Times Co. v. Sullivan*,[1] the United States Supreme Court's first resort to the Constitution to strike a balance between the public's interest in the free flow of information and an individual's right to a reputation unsullied by the publication of falsehoods, the Court held that the free speech guarantees provided by the first and fourteenth amendments required: "[A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[2]

Authors Nelson and Teeter celebrated this decision as "a great new protection against libel judgments . . . for the mass media."[3] Justice Black's concurring opinion, in which Justice Douglas joined, suggested, however, that the majority opinion was unfaithful to the first amendment by allowing the imposition of damages in state courts for libel arising out of the criticism of officials and the discussion of public affairs.[4] Calling the new actual malice standard a 'stopgap' measure,[5] Justice Black presciently advised: " 'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the

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* Partner in the firm of Belser, Baker, Barwick, Ravenel, Toal and Bender, Columbia, South Carolina. University of South Carolina (B.A., 1970); University of South Carolina (J.D., 1975). Member of the South Carolina Occupational Health & Safety Review Board. Editor, South Carolina Bar Transcript. Member, South Carolina Bar. Counsel, South Carolina Press Association.

1. 376 U.S. 254 (1964).
2. *Id.* at 279-80.
3. H. NELSON & D. TEETER, JR., LAW OF COMMUNICATIONS 57 (4th ed. 1982).
4. 376 U.S. at 296 (Black, J., concurring).
5. *Id.* at 295.

right critically to discuss public affairs . . . ."[6]

The Court first extended the federal actual malice rule of *New York Times* to public figures[7] and then to private citizens defamed in the context of matters of public or general interest.[8] Each decision added new complications to an area of law filled with "anomalies and absurdities for which no legal writer ever has had a kind word."[9] At one point the Supreme Court frankly conceded: "This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."[10]

After admitting that it was struggling, the Court proceeded with its wholesale revision of common law defamation by dividing libel plaintiffs into two categories: (1) those who must prove actual malice to recover and (2) those who must prove some lesser level of fault on the part of the publisher.[11] In the latter instance, the Court left to the states the problem of defining the fault standard required of a private citizen libel plaintiff. In a substantial departure from the common law of libel, the Supreme Court barred both presumed and punitive damages in those cases in which a plaintiff did not establish defendant's liability under the actual malice standard.[12] For those cases in which a plaintiff met a state standard of fault that was less than actual malice, the Court limited the plaintiff's recovery to compensation for actual injury.[13]

Discussing the nature of compensatory damages allowed under the new doctrine the Court said:

> We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.[14]

The Court retained punitive damages under the new scheme for private figure plaintiffs who established liability under the actual malice standard, notwithstanding the Court's view that "juries assess punitive dam-

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6. *Id.* at 293.
7. Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).
8. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
9. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 111, at 771 (5th ed. 1984) [hereinafter PROSSER & KEETON].
10. Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974).
11. *Id.*
12. *Id.* at 349.
13. *Id.* at 349-59.
14. *Id.* at 350.

ages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."[15]

The amount of damages courts award plaintiffs in libel actions has been a focal point of discussion by the Supreme Court as it has attempted to balance individual reputation interests against a desire to diminish the threat that self-censorship will impede the flow of information.[16] The jury awarded plaintiff L.B. Sullivan a judgment of $500,000, an amount that prompted Justice Black to observe: "The half-million dollar verdict does give dramatic proof . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials."[17]

Sullivan's award might have seemed threatening to Justice Black, but awards that followed substantially eclipsed the Sullivan award. In *Curtis Publishing Co. v. Butts*,[18] the jury awarded the plaintiff, a former football coach, $60,000 in general damages and $3,000,000 in punitive damages.[19] In *Associated Press v. Walker*,[20] a case the Court decided together with *Butts*, the jury returned a verdict of $500,000 compensatory damages and $300,000 punitive damages for a resigned Army leader.[21] The jury awarded plaintiff in *Rosenbloom v. Metromedia*[22] $25,000 in general damages and $725,000 in punitive damages.[23] Yet, after all the concurring and dissenting opinions in these cases had had their effect on the law of libel, the cost was still going up. In Alton, Illinois, the *Telegraph*, a small newspaper with an annual profit of $200,000, paid $1,400,000 to compromise a $9,200,000 verdict.[24] In addition, since the Supreme Court was not alone in struggling to balance the competing interests, libel was becoming a very complex area of the law. With this complexity came indeterminate outcomes and a quantum increase in the cost of defending against libel claims.

When the degree of probable falsity[25] and the state of mind in the newsroom[26] became the basis for establishing liability, discovery costs mounted. While inflation is certainly a factor in the two hundred to four hundred percent increase in the cost of defending libel suits since the

15. *Id.*
16. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 49-50 (1971).
17. 376 U.S. at 294 (Black, J., concurring).
18. 388 U.S. 130 (1967).
19. *Id.* at 138.
20. 388 U.S. 130 (1967).
21. *Id.* at 141.
22. 403 U.S. 29 (1971).
23. *Id.* at 40.
24. B. DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 189 (1986).
25. St. Amant v. Thompson, 390 U.S. 727 (1968).
26. Herbert v. Lando, 441 U.S. 153 (1979).

New York Times decision in 1964, the actual amount spent to defend a libel case is said to average between $95,000 and $150,000.[27] The Alton *Telegraph* spent in excess of $600,000 and lost.[28] Insurance, when available, is one hundred to three hundred percent more expensive than in 1980.[29]

Given this history of the development of a constitutional defense to libel and its apparent results, Justice White most likely will have increasing companionship in his "increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it."[30] Actual malice remains the basis for liability in cases brought by public officials and public figures, as well as the basis for punitive damage awards to private citizen plaintiffs. The threshold for liability to allow a private citizen plaintiff to recover compensatory damages for "actual injury"[31] is set by the states.[32] These substantial transformations in the doctrine of libel have failed to meet the Supreme Court's goal of establishing a "federal rule"[33] that will accommodate the often antagonistic goals of the maintenance of a free press to advance responsible government, "truth, science, morality, and arts in general"[34] and the compensation of wrongful injury to reputation.[35]

The failure to establish a "federal rule" is perhaps most visible when the shift in focus from injury to reputation to culpability for the publication of defamatory material has created a climate of conspiracy. Such a climate suggests that the press never errs, only aims. Plaintiffs seeking to prove the knowing publication of falsehoods or the publication of material with a reckless disregard for its falsity engage in extensive discovery to map the mind of the defendant. As Justice Black noted in his *New York Times* concurrence, malice is difficult to prove and difficult to disprove.[36] In addition, Justice White observed in his concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[37] that this is expen-

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27. THE GANNETT CENTER FOR MEDIA STUDIES CONFERENCE REPORT, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 3 (1986).

28. *Id.* at 5.

29. *Id.* at 3.

30. Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc., 472 U.S. 744, 767 (1985) (White, J., concurring in judgment).

31. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1975).

32. *Id.* at 347.

33. 376 U.S. at 279.

34. 388 U.S. at 147 (citing Letter to the Inhabitants of Quebec, 1 JOURNALS OF THE CONTINENTAL CONG. 108 (1774)).

35. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1975).

36. 376 U.S. at 293 (Black, J., concurring).

37. 472 U.S. 749 (1985).

sive litigation.[38]

From the perspective of the press, the undesirable consequences of the Supreme Court's decisions have not been fully realized. In those states in which the courts have disguised the constitutional privilege to make it nearly unrecognizable, several factors have combined to expose publishers and reporters to risk for failing to publish in accordance with the decisions of those states. These factors include difficulty of predicting outcome on the question of plaintiffs' status, long-arm jurisdiction, and less-than-rigorous application of the constitutional privilege.

Publishers, editors, and reporters are subject to suit in states remote from the origin of the publication[39] even though, under some circumstances, the plaintiff does not reside in the forum state.[40] Under these conditions and the single publication doctrine,[41] a plaintiff could bring an action for injuries suffered in all jurisdictions in a state where there is an extended statutory period for the initiation of the action to recover damages,[42] using the forum state's threshold for liability. If that threshold is low, or if that state's interpretation of the "actual malice" standard seems more relaxed than that set by the Supreme Court, the states with the longest statutes of limitations and lowest thresholds of liability in reality create the federal rule for libel. The opinion of the South Carolina Supreme Court in *Jones v. Sun Publishing Co.*[43] is an example of a low threshold.

In *Jones*, the court reinstated a $35,000 actual damages award for a plaintiff who, having been arrested along with his father, uncle, and two others, was mistakenly identified as having entered a guilty plea to charges of copyright infringement.[44] In fact, plaintiff's father and uncle, both surnamed Jones, entered guilty pleas in a plea bargain that resulted in the dismissal of charges against plaintiff. The reporter testified at trial that he obtained his information identifying plaintiff as the one entering a guilty plea from a telephone conversation with an assistant United States Attorney in charge of the prosecution. The attorney testified that he had confused the various Joneses on a previous occasion, and that he had no specific recollection of what he told the reporter.[45] The court noted that defendant did not claim that plaintiff Jones' arrest and arraignment for pirating stereo tapes made him a public figure, and held

38. *Id.* at 774 (White, J., concurring).
39. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).
40. Calder v. Jones, 465 U.S. 783 (1984).
41. RESTATEMENT (SECOND) OF TORTS § 577A (1976).
42. 465 U.S. at 773 (using New Hampshire's unique six-year statue of limitations).
43. 278 S.C. 12, 292 S.E.2d 23 (1982).
44. *Id.* at 17. 292 S.E.2d at 25.
45. *Id.* at 14, 292 S.E.2d at 23-24.

that the failure of the reporter personally to inspect a public record located no closer than seventy miles from his newsroom,[46] rather than relying on information supplied by telephone, was negligence.[47] Two justices dissented, arguing that other jurisdictions considering similar cases had uniformly reached the opposite result,[48] and that nothing in the record established that the reporter deviated from the practice of reasonably prudent reporters in similar circumstances.[49] The absence of testimony regarding plaintiff's status as a public figure is likely to have had little effect on the outcome, because a person engaged in criminal conduct is not automatically a public figure when discussing his brush with the law;[50] therefore, the majority's view of the degree of fault necessary to satisfy the actual-injury standard set forth in *Gertz v. Robert Welch, Inc.*,[51] controlled. Unfortunately for the press, it is difficult to distinguish the *Jones* view of negligence from the rule of strict liability that existed prior to *Gertz*.

Consistent with its low threshold of fault for liability, South Carolina's view of actual malice exposes libel defendants to punitive damage verdicts for conduct that might be merely negligent elsewhere. In *Deloach v. Beaufort Gazette*,[52] the South Carolina Supreme Court affirmed a jury verdict for actual and punitive damages for a plaintiff erroneously identified by a reporter as having been arrested for assault and battery.[53] A police incident report identified the plaintiff as having been in a fight, but as the defendant's voluntary retraction stated, he was neither arrested nor charged. The reporter testified that, while he and a police lieutenant reviewed incident reports, the lieutenant told him that a warrant had been issued and the plaintiff arrested. The police lieutenant denied telling the reporter that there had been an arrest or a warrant.[54] The court held that because the lieutenant at trial denied telling the reporter that the plaintiff had been arrested and charged: "[I]t is clearly inferable that the reporter had a high degree of awareness of the probable falseness of the statement he printed or had serious doubts as to its truth."[55] These two cases illustrate the difficulty of achieving a truly national application of a constitutional rule that the courts have founded on abstractions and

46. *Id.* at 22, 292 S.E.2d at 28 (Lewis, C.J., dissenting).
47. 278 S.C. at 15, 292 S.E.2d at 24.
48. *Id.* at 20, 292 S.E.2d at 27 (Lewis, C.J., dissenting).
49. *Id.* at 23, 292 S.E.2d at 28 (Littlejohn, J., dissenting).
50. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979).
51. 418 U.S. 323 (1974).
52. 281 S.C. 474, 316 S.E.2d 139 (1984).
53. *Id.* at 480, 316 S.E.2d at 143.
54. *Id.*
55. *Id.* at 478, 316 S.E.2d at 142 (citing St. Amant v. Thompson, 390 U.S. 727, 731-33 (1968)).

matters of degree, and suggest that the struggle with libel is far from ended.

If the United States Supreme Court's efforts from *New York Times* to the present have failed to strike a sound balance between a free press and individual reputation, perhaps it is time to reconsider both the approach taken and the balance struck. Justice White suggests a legislative solution,[56] but given the past inability of legislative bodies to respect freedom of the press,[57] a judicial solution is perhaps more likely. To be effective, the solution should establish a federal standard for liability and damages that will protect the ability of the press to function without self-censorship, while allowing fair compensation for plaintiffs who have suffered measurable injury. In the process, it would be desirable to reduce the complexity of libel litigation so that the cost of defense alone does not become a bar to robust reporting on matters of public or general concern.

As a first step, there should be a return to strict liability, that is, "strict liability, apart from either wrongful intent or negligence."[58] Prior to *Gertz*, strict liability was the basis for a defamed plaintiff's action.[59] Although a return to the rule of yesteryear will not alone strike the appropriate balance, strict liability will shift the focus of litigation away from culpability to falsity and injury, provided an appropriate burden of proof and a strict control on damages that juries may award accompany the return.

In *Philadelphia Newspapers, Inc. v. Hepps*,[60] the Court held that truth was no longer an affirmative defense, but: "[A]t least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without . . . showing that the statements at issue are false."[61] Expansion of this rule to encompass all plaintiffs without regard to characterizing the content of the publication as 'of public or general interest'[62] eliminates the essentially abstract, philosophical issue about what is a matter of public or general interest, thereby simplifying the litigation and avoiding the undesirable burden of ad hoc decisions on the question.[63] Expansion of the rule to all plaintiffs eliminates the need to litigate the plaintiff's status as either a public official/figure or private citizen, thereby restoring an element of predictability to libel litigation. In each case, the plaintiff will have the same status and will bear the

56. 472 U.S. at 774 (White, J., concurring).
57. *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936).
58. PROSSER & KEETON, *supra* note 9, § 75.
59. 418 U.S. at 376 (White, J., dissenting).
60. 106 S.Ct. 1558 (1986).
61. *Id.* at 1559.
62. 403 U.S. at 40-45, *see also id.* at 44 n.12.
63. 418 U.S. at 346.

burden of proving the falsity of the offending statement.

The Supreme Court established the weight of the burden of proof for public officials and public figures in *New York Times* and *Gertz*. In *New York Times*, the Court required proof on the issue of actual malice to be of " 'convincing clarity' "[64] and in *Gertz*, the Court described the burden as " 'clear and convincing proof.' "[65] Some people will argue that the burden is too great to be borne, and there are others who will argue that only an absolute constitutional bar to libel will protect the press. In defense of the burden, however, placing the burden of proving falsity on the plaintiff is an attempt to reach a position of equipoise between antithetical interests.

Once a plaintiff proves falsity, he still should not be entitled to "gratuitous awards of money damages far in excess of any actual injury."[66] The Supreme Court in *Gertz* confidently stated that trial courts could, by appropriate instructions, insure that juries award damages for proof of injury supported by competent evidence.[67] Given the damage award experience detailed above, the Court's confidence seems misplaced, and, notwithstanding the prohibition against presumed damages,[68] juries seem to be awarding damages in excess of any loss the plaintiff suffered. To achieve the goal of compensatory damages for injury to a plaintiff's relationship to the community, courts should require a plaintiff to prove a pecuniary loss flowing from the libel; in other words, the plaintiff must prove that the libel was the proximate cause of a loss flowing from injury to reputation or standing.

As for punitive damages, the Supreme Court in *Gertz* could find no justification for allowing punitive damages awards under state-defined standards of liability.[69] Stating the effect of punitive damages, the Court said:

> [J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but . . . punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.[70]

If protection from self-censorship is to remain a cornerstone of consti-

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64. 376 U.S. at 285-86.
65. 418 U.S. at 342.
66. *Id.* at 349.
67. *Id.* at 350.
68. *Id.* at 349.
69. *Id.* at 350.
70. *Id.*

tutional protection against libel, no justification can exist for allowing a jury to award punitive damages when, under a strict liability theory of recovery, the defendant's conduct is irrelevant to the question of liability. To allow the recovery of punitive damages would require plaintiffs to prove some level of gross misconduct,[71] and the dichotomy created by *Gertz* would remain, thereby obviating any potential gain for economy and predictability in libel litigation. In addition, as is becoming the case in products liability litigation,[72] frequent assessment of large punitive damages awards could become a threat to the continuing vitality of a free press.

The civil-rights struggle begat *New York Times*, and while the fires of that movement have been banked, the courts, the press and the public continue to struggle to find a proper balance between a robust press and an individual's right to retain a sound reputation or to be compensated for real injury to reputation. In the more than two decades since *New York Times*, the efforts of the courts have combined to produce not a comprehensive, understandable body of law free from the complexities of the earlier common law, but a rococo masterpiece that is decorative and almost without substance. The proposals herein may not be a peace plan, but perhaps can serve as an agenda so that the negotiations to end the struggle may begin.

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71. *Cf.* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976).

72. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982).