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## Is The *New York Times* "Actual Malice" Standard Really Necessary? A Comparative Perspective

Russell L. Weaver\*

Geoffrey Bennett\*\*

In *New York Times Co. v. Sullivan*,<sup>1</sup> the United States Supreme Court extended First Amendment guarantees to defamation actions.<sup>2</sup> Many greeted the Court's decision with joy. Alexander Meiklejohn claimed that the decision was "an occasion for dancing in the streets."<sup>3</sup> He believed that the decision would have a major impact on defamation law, and he was right. After the decision, many years elapsed during which "there were virtually no recoveries by public officials in libel actions."<sup>4</sup>

The most important component of the *New York Times* decision was its "actual malice" standard. This standard provided that, in order to recover against a media defendant, a public official must demonstrate that the defendant acted with "malice."<sup>5</sup> In other words, the official must show that the defendant knew that the defamatory statement was

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1. 376 U.S. 254, 84 S. Ct. 710 (1964).

2. See Sheldon W. Halpern, *Of Libel, Language, And Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. Rev. 273, 277 (1990) ("Certainly, *Sullivan* was new; it was 'the first time' that the Supreme Court spoke directly of the extent to which the first amendment limited the common-law defamation action"); David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 211 (1976) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370, 94 S. Ct. 2997, 3022 (1974) (White, J., dissenting)); Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. Pa. L. Rev. 1333, 1343 (1991) ("Brennan's opinion in *New York Times* revolutionized the law of libel and, perhaps more important, signalled a critical shift in our first amendment jurisprudence").

3. Quoted in Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 221 n.125. Columnist Anthony Lewis remarked, many years later, that he regarded *Sullivan* as a "thrilling" decision. Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 Colum. L. Rev. 603, 625 (1983).

4. Lewis, *supra* note 3, at 608.

5. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964).

false or acted in reckless disregard for the truth.<sup>6</sup> The Court adopted this standard because it felt that free and robust debate inevitably generates erroneous statements, and that some degree of error must be tolerated in order to provide "breathing space" for free expression.<sup>7</sup>

But the *New York Times* decision may no longer be providing the breathing space that it once did. Recent studies suggest that libel litigation in the United States is increasing<sup>8</sup> and that defamation awards occur more frequently and in much larger amounts.<sup>9</sup> Such information prompted Professor Richard Epstein of the University of Chicago Law School to observe recently that "the onslaught of defamation actions is greater in number and severity than it was in the 'bad old days' of common law libel, as is evidenced by data collected by the Libel Defense Resource Center, which shows a steady increase in defamation suits notwithstanding *New York Times*."<sup>10</sup>

Not only is libel litigation on the increase, but the cost of that litigation has become prohibitive. This is due, in part, to the fact that the actual malice standard encourages plaintiffs to seek extensive dis-

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6. *Id.*, 84 S. Ct. at 726.

7. *Id.*, 84 S. Ct. at 726. Although the actual malice standard survived the Rehnquist revolution, it has been scaled back somewhat. Compare *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44, 91 S. Ct. 1811, 1820 (1971) ("We honor the commitment to robust debate on public issues . . . by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous") with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343, 94 S. Ct. 2997, 3008-09 (1974) ("[W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them").

8. See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782 (1986).

9. Libel Defense Resource Center Press Release 1 (Sept. 26, 1991):

The new LDRC findings, summarizing a comprehensive report to be issued later this month, cover the two years ending December 31, 1990. The LDRC study documents a dramatic increase in the already-high average of damage awards against media defendants in libel (and related) cases. Compared to the prior two-year period, the average award increased ten-fold, from almost half-a-million in 1987-88 (\$431,730) to just under \$4.5 million in 1989-90 (\$4,470,460). This most recent average is more than 3 times larger than the average award for the 8 years prior to the most recent study period, which was just under \$1.5 million (\$1,420,866). Including the most recent data, the average media libel award for the decade, 1980-90, was nearly \$2 million (\$1,836,557).

10. Epstein, *supra* note 8, at 783; see also Lewis, *supra* note 3, at 603 ("This is an appropriate time to think again about that great case. It is a time of growing libel litigation, of enormous judgments and enormous costs"); Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1 (1983) ("an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money").

covery of editorial decision-making processes.<sup>11</sup> Such discovery, which is the only way to determine whether a defendant acted knowingly or recklessly, is quite costly. In *Herbert v. Lando*,<sup>12</sup> discovery lasted for eight years and cost CBS between \$3 million and \$4 million in legal fees.<sup>13</sup> Cases like these have prompted some commentators to argue that the Court should provide even greater protection to newspapers and broadcasters including, possibly, a ban on libel suits by public officials.<sup>14</sup>

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11. Anthony Lewis describes the process that might transpire in a case, making specific reference to the case of *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985):

The first thing that is going to happen in the *Westmoreland* case is discovery: intensive, prolonged, enormous discovery. The General's lawyers will try to learn everything about the preparation and editing of the documentary. They will ask for all the film shot in the making of the program, of which of course only a small portion went on the air; it is routine for commercial networks to spend hours on a filmed interview for such a documentary, for example, and then use only minutes or even seconds. The lawyers will ask for scripts from all stages of the enterprise, and for internal memoranda among reporters, editors, and producers. The effort will be to show what General Westmoreland and his friends have already charged: that CBS had material in hand disproving its conspiracy theory about the infiltration figures but deliberately chose not to use it—in other words, that CBS could and should have made a different program. The lawyers will surely also ask for the report of the CBS internal investigation. They will depose the producers and reporters. They will depose the witnesses who made the charges on the program, asking them for their sources.

CBS's lawyers will be at least as ingenious and determined. They will turn to all imaginable public and private sources to explore the accuracy of what the program said—and of what General Westmoreland says it said. They will depose the General, taking him in infinite detail over the conduct of the war in Vietnam. They will depose men who were with him there, army officers and CIA agents and diplomats, and they will depose high Washington officials of that time: everyone involved in the estimates of enemy strength, from the field to the White House. They will no doubt also look into the *TV Guide* article that may have provoked the libel suit. The article relied on confidential sources inside CBS, who leaked unedited transcripts of the full interviews from which editors put the program together. Who were those sources?

The prospect of discovery in the *Westmoreland* case is so endless that a cynic might suggest a conspiracy by lawyers. And the irony is that discovery has become as massive as it has in libel cases in large part because of *New York Times v. Sullivan*.

Lewis, *supra* note 3, at 609-10; see also Halpern, *supra* note 2, at 279-80. The abuse of discovery is a potential hazard not confined to U.S. defamation law. See Nick Armstrong, *Discovery Abuse and Judicial Management*, 142 *New L.J.* 927 (1992). The contrast between the U.S. and English approaches is striking and reflects differences in the way cases are pleaded and processed in the two jurisdictions.

12. 441 U.S. 153, 99 S. Ct. 1635 (1979).

13. See Lewis, *supra* note 3, at 611-12.

14. See Martin Garbus, *25 Years After "Times v. Sullivan": What Remains to Be Done*, 201 *N.Y. L.J.* 2-3 (1989) ("One idea advanced by Professor Theodore Silver, a libel law scholar, is to require the injured party to prove that the media intentionally

Despite these dire assessments, it is possible to argue that the *New York Times* decision still provides adequate protection to libel defendants. Indeed, one might even argue that it provides too much protection. British defamation law is significantly more restrictive than U.S. law. Indeed, after the *New York Times* decision was rendered, English politicians considered whether to adopt a similar standard and declined to do so.<sup>15</sup> They felt that the actual malice standard was unnecessary, and they left in place existing law which allows plaintiffs to more easily recover against media defendants than in the United States.<sup>16</sup> As a result, British plaintiffs have been able to recover substantial judgments against newspapers and broadcasters. Nevertheless, the British press seems to be free and robust. England has plenty of newspapers, including tabloids and scandal sheets. Moreover, throughout Britain, there seems to be more concern about the need to control the press, in an effort to prevent "irresponsible journalism," than there is about the need for an actual malice standard.<sup>17</sup>

The British situation raises questions about the need for an actual malice standard in the United States. This question is not purely academic. If the standard is not necessary, then a strong argument can be made for eliminating it. Every defamation case involves a conflict between the public interest in free speech, and the state interest in providing redress to those who have been defamed.<sup>18</sup> The Supreme Court recognized the existence of these conflicting interests in *Gertz v. Robert Welch, Inc.*:<sup>19</sup> "[W]e believe that the *New York Times* rule states an accommodation between [free speech concerns] and the limited state interest present in the context of libel actions brought by public persons."<sup>20</sup> If the actual malice standard is not essential to insure breathing space for free expression, then it should be abandoned.

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tried to harm him—it would not be enough to show only that the media acted in reckless disregard of the truth." He also notes: "I believe that public officials and public figures should not be permitted to sue for libel"); Lewis, *supra* note 3, at 614-24.

15. The British Government's latest report continues to reject the idea of a *New York Times* defense. See Supreme Court Procedure Committee Report on Practice and Procedure in Defamation (1991).

16. See W.V.H. Rogers, Winfield and Jolowicz on Tort 345 (13th ed. 1989).

17. Supreme Court Procedure Committee Report, *supra* note 15, at 164-65.

18. See Epstein, *supra* note 8, at 801-02:

Initially the [actual malice] rule offends the sense of justice because it makes innocent persons bear the harms that have been inflicted upon them by other persons, including those who have acted with negligence or even gross negligence. Indeed my own view is that the proper rule in defamation is strict liability, as it was at common law, so that the deviation between the present law and the ideal is even greater than it might seem to others. The question, then, is what public interest can justify the deviation from these ordinary standards of liability?

19. 418 U.S. 323, 94 S. Ct. 2997 (1974).

20. *Id.* at 343, 94 S. Ct. at 3008.

In an effort to explore these conflicting views of the *New York Times* decision, this article compares how the British media functions under Britain's more restrictive defamation laws with how the U.S. media functions under the actual malice standard. It does so based on interviews with reporters, editors, defamation lawyers, and others involved in the media in an effort to understand how they decide which stories to publish, and to gain some understanding of how libel laws affect editorial decisionmaking.

### I. THE NEW YORK TIMES ASSUMPTIONS

The actual malice standard was based on a complex set of assumptions. In the *New York Times* decision, the Supreme Court began by emphasizing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and recognized that such debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>21</sup> Nevertheless, the Court concluded that freedom of discussion is critical to the effective functioning of the political process.<sup>22</sup>

21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964).

22. *Id.* at 269-70, 84 S. Ct. at 720:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1308, 1 L.Ed.2d 1498. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369, 51 S. Ct. 532, 536, 75 L.Ed. 1117. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270, 62 S. Ct. 190, 197, 86 L.Ed. 192, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N.A.A.C.P. v. Button*, 371 U.S. 415, 429, 83 S. Ct. 328, 9 L.Ed.2d 405. The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943). Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375-76, 47 S. Ct. 641, 648, 71 L.Ed. 1095, gave the principle its classic formulation:

"Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human

The Court's decision was, no doubt, heavily influenced by the nature of the case before it. The *New York Times* case arose during the 1960s, and involved an advertisement complaining that public officials had acted in a racially discriminatory manner.<sup>23</sup> The Court readily concluded

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

23. The case arose during the relatively turbulent decade of the 1960s and involved the historic struggle by African-Americans, and others, for their civil rights. The case involved a full-page advertisement titled "Heed Their Rising Voices," describing events that had allegedly transpired in Montgomery, Alabama. *Id.* at 256, 84 S. Ct. at 713. The Court summarized the ad as follows:

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the *New York Times* on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

*Id.* at 256-57, 84 S. Ct. at 713-14.

Respondent L.B. Sullivan was one of three elected Commissioners of the City of Montgomery, Alabama, and was designated "Commissioner of Public Affairs" with responsibility for, among other things, supervision of the Police Department. Sullivan claimed that the advertisement defamed him because it made several allegations regarding



that the ad fit within the scope of public debate: "The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection."<sup>24</sup>

Nevertheless, the Court's decision to extend constitutional protection to defamation actions was revolutionary. Prior to the Court's decision, states had been free to define the nature and basis of defamation liability.<sup>25</sup> The *New York Times* decision did not deprive them of this

police conduct in Montgomery. *Id.* at 257-58, 84 S. Ct. at 714:

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

"In Montgomery, Alabama, after students sang 'My Country, Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:

"Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*."

In addition, Sullivan alleged that some of these statements were untrue, but that all of them defamed him as Commissioner of Public Affairs.

24. *Id.* at 271, 84 S. Ct. at 721.

25. Under Alabama law, the ad was "libelous per se" and not privileged. *Id.* at 262, 84 S. Ct. at 716. As a result, the trial court judge instructed the jury that they should find for Sullivan if they concluded that the *New York Times* had published the advertisement, as well as "that the statements were made 'of and concerning' respondent." *Id.*, 84 S. Ct. at 716. The judge also instructed the jury that, even though Sullivan offered no proof of actual pecuniary loss, they should presume that respondent had suffered legal injury on the mere proof of publication. *Id.*, 84 S. Ct. at 716. The judge gave this instruction because Alabama law provided that, if the advertisement was libelous per se, falsity and malice were presumed. *Id.*, 84 S. Ct. at 716.

Respondent also sought punitive damages. Under Alabama law, a court could only award punitive damages to a public officer if the official had first made a written demand for a public retraction, and the defendant had failed or refused to make the retraction. *Id.* at 261, 84 S. Ct. at 716. Sullivan had served the required demand on petitioners, but none of them had responded. *Id.*, 84 S. Ct. at 716. The judge therefore submitted an instruction on punitive damages which stated that punitive damages could only be awarded based on a showing of "actual malice," and could not be awarded based merely on a showing of negligent or careless conduct. *Id.* at 262, 84 S. Ct. at 716. However, the trial judge refused to instruct the jury that they must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness." *Id.*, 84 S. Ct. at 716.

The jury returned a verdict for Sullivan in the amount of \$500,000. *Id.* at 256, 84

power, but it placed constitutional limits on the scope of their power. The Court suggested that public officials must be willing to endure a level of criticism: just as judges must be "men of fortitude, able to thrive in a hardy climate,"<sup>26</sup> "surely the same must be true of other government officials, such as elected city commissioners."<sup>27</sup> In addition, they must endure a certain amount of "erroneous statement" about their conduct: a degree of error is "inevitable in free debate,"<sup>28</sup> and the Constitution must protect some of these errors in order to provide adequate "breathing space" for free expression.<sup>29</sup>

Based on these assumptions, the Court held that even though Alabama's libel law contained a "defense of truth," this defense was not

S. Ct. at 713. The verdict did not differentiate between actual and punitive damages. In fact, the judge refused a jury instruction that would have required the differentiation between actual and punitive damages. *Id.* at 262, 84 S. Ct. at 716.

The *New York Times* appealed the judgment to the Alabama Supreme Court, but that court affirmed. The court agreed that petitioners' statements were libelous per se, and that they were actionable without proof of pecuniary injury. *Id.* at 263, 84 S. Ct. at 717. After finding that the statements referred to Sullivan, the court concluded that the *New York Times* had acted irresponsibly. The Alabama Supreme Court placed great emphasis on the fact that "the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement." *Id.* at 263, 84 S. Ct. at 717..

26. *Id.* at 273, 84 S. Ct. at 722 (quoting *Craig v. Harney*, 331 U.S. 367, 376, 67 S. Ct. 1249, 1255 (1947)).

27. *Id.*, 84 S. Ct. at 722.

28. *Id.* at 271, 84 S. Ct. at 721. The Court stated in full that:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. . . . The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v. Button*, 371 U.S. 415, 445, 83 S. Ct. 328, 344, 9 L.Ed.2d 405. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliott's Debates on the Federal Constitution* (1876), p. 571. In *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S. Ct. 900, 906, 84 L.Ed. 1213, the Court declared:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion, and right conduct on the part of the citizens of a democracy."

29. *Id.* at 271-72, 84 S. Ct. at 721 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963)): "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"

enough. It did not provide sufficient protection for erroneous statements:<sup>30</sup> “A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . ‘self-censorship.’”<sup>31</sup> The Court believed that, with a defense of truth, Alabama would deter false speech,<sup>32</sup> but it might also deter true speech and dampen the vigor of public debate:

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wide of the unlawful zone.” *Speiser v. Randall*, supra, 357 U.S., at 526, 78 S.Ct. at 1342, 2 L.Ed.2d 1460. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.<sup>33</sup>

The Court articulated the actual malice standard which provided that “neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct” and “the combination of the two elements is no less inadequate.”<sup>34</sup> In order to recover, a plaintiff must demonstrate that the plaintiff acted with actual malice:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that 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.<sup>35</sup>

## II. ENGLISH DEFAMATION LAW

British defamation law is inconsistent with many of the fundamental principles articulated in the *New York Times* decision.

### A. Standards Governing Damage Awards Against Media Defendants

Britain provides limited protection to the press and media when they criticize governmental officials. In order to recover, plaintiffs need only show that the press or media made defamatory statements that referred to them or that reasonable people would regard as referring to the

30. *Id.* at 278, 84 S. Ct. at 725.

31. *Id.* at 279, 84 S. Ct. at 725.

32. *Id.*, 84 S. Ct. at 725.

33. *Id.* at 279, 84 S. Ct. at 725-26 (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 1342 (1958)).

34. *Id.* at 273, 84 S. Ct. at 722.

35. *Id.* at 279-80, 84 S. Ct. at 726.

plaintiffs.<sup>36</sup> In theory, an additional requirement exists—that the statements must have been maliciously published. But this requirement is, in the words of a leading commentator, “purely formal.”<sup>37</sup> “Though the word [maliciously] is usually inserted in the plaintiff’s statement of claim, no one takes any notice of it at the trial except for the purpose of inflating damages where there has been spite or deliberateness.”<sup>38</sup>

The media and press do have a privilege of fair comment.<sup>39</sup> But the scope of this right is severely limited; it protects only assertions of opinion, and not assertions of fact.<sup>40</sup> This is an important distinction. If, for example, the press believes that the government has been involved in illegal or improper conduct, proceeds cautiously in gathering its evidence, and accuses governmental officials of misconduct, it still might be held liable in defamation if its factual assertions are incorrect. Britain recognizes privileges other than fair comment, but virtually all of them require that all reporting be fair and accurate.<sup>41</sup>

From time to time, those in the British press and media have called on British officials to adopt what they refer to as the “Sullivan defense.” For example, following the announcement of a large defamation judgment against a media defendant, an editorial in the *Financial Times* pointedly argued that the government should provide the press with greater protection:

[T]he observer of the English libel scene may reasonably cast envious eyes across the Atlantic, for US law relating to libel suits is much more solicitous about press freedom and less protective of the defamed than is English law. US laws require private plaintiffs to prove at least that the defendant publisher has been negligent with respect to the falsity of the words used

....  
....

English law has so far made only a half-hearted attempt to cope with the problem of inaccuracies in reporting by newspapers. Section 4 of the Defamation Act 1952 is an exception to the rule that whoever libels another is strictly liable unless he proves the substantive truth of his statement, and incorporates the notion of unintentional defamation. But the provision is cumbersome in its phraseology and has in practice been resorted to very infrequently.

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36. Rogers, *supra* note 16, at 302-21.

37. *Id.* at 314.

38. *Id.* at 314-15.

39. *Id.* at 324-32.

40. *Id.* at 325.

41. *Id.* at 332-45.

Without a more generous application of the principle that there should be no legal remedy if the libel is unintentional, the press in England will continue to be vulnerable to constant and expensive litigation. If, as is expected, the Court of Appeal sends the Private Eye case back for a fresh assessment of damages, it will at least give an impetus for reform of the libel laws, to the general benefit of publishing.<sup>42</sup>

In another editorial in the *Financial Times*, a journalist argued that "instead of resisting legislative proposals recently prompted and designed to protect the individual from the outcrop of irresponsible journalism, the Government would do better to ensure the proper balance between the public right to freedom of the press and the rights of the private citizens."<sup>43</sup>

But the British government has generally been unresponsive to these pleas. In a 1991 report, the Supreme Court Procedure Committee reviewed British defamation law,<sup>44</sup> and considered whether England should adopt the *New York Times* defense.<sup>45</sup> It did so at the prompting of the British media,<sup>46</sup> and it did so with full recognition that the *New York Times* defense "has led to a fundamental distinction between defamation law, as applied within that jurisdiction [the United States], and its English counterpart."<sup>47</sup> But the Committee decided not to recommend in favor of the *New York Times* defense. In its view, adoption of such a defense would encourage "irresponsible" journalism:

Standards of care and accuracy in the press are, in our view, not such as to give any confidence that a "Sullivan" defence would be treated responsibly. It would mean, in effect, that newspapers could publish more or less what they like, provided they were honest, if their subject happened to be within the definition of a "public figure". We think this would lead to great injustice. Furthermore, it would be quite contrary to the tradition of our common law that citizens are not divided into

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42. The *Financial Times*, Oct. 9, 1989, at 48. There have been other proposals for change as well. See Robert O'Connor, *The Debate Over Britain's Libel Laws: Discussions Have Intensified Since the Death of Robert Maxwell*, Editor and Publisher, Feb. 29, 1992, at 22-23.

43. The *Financial Times*, May 30, 1989, at 44.

44. Supreme Court Procedure Committee Report, *supra* note 15.

45. *Id.* at 164-65.

46. *Id.* at 164:

It has been suggested to us by some media representatives that we should consider the introduction of a defence similar to that applied in the United States in the light of the decision in *New York Times v. Sullivan* (1964) 376 U.S. 254.

47. *Id.* at 164.

different classes. What matters is the subject-matter of the publication and how it is treated, rather than who happens to be the subject of the allegations.<sup>48</sup>

In the Committee's view, "the media are adequately protected by the defenses of justification and fair comment at the moment, and it is salutary that these defenses are available to them only if they have got their facts substantially correct."<sup>49</sup>

### B. *Damage Awards*

Because Britain does not have an actual malice standard, British politicians and public figures have been quite successful in their efforts to bring defamation actions against the press and media. In 1987, a senior conservative politician, Norman Tebbit, brought suit against the BBC for attributing to him the statement, "Nobody with a conscience votes Conservative."<sup>50</sup> He also brought suit against Lawrence Knight, President of the National Union of Mineworkers, for making the same statement.<sup>51</sup> Against the BBC, Tebbit received £2,000 plus costs.<sup>52</sup>

In 1986 five Conservative Members of Parliament (MPs) brought suit against the BBC for allegations made in its *Panorama* program.<sup>53</sup> The allegations linked the MPs to extreme racist groups that were allegedly trying to infiltrate the Tory Party.<sup>54</sup> In the program, the BBC used pictures of the National Front, of Nazi regalia, and of music associated with fascism.<sup>55</sup> The BBC settled the suits. Two MPs received approximately £300,000 in damages and legal fees plus an apology.<sup>56</sup> The other MPs received undisclosed sums.<sup>57</sup>

Even though the suits listed above involved substantial sums, each seems relatively modest in comparison with Jeffrey Archer's judgment against *The Star* newspaper. Archer, a famous author and playwright, was also a Deputy Chairman of the Conservative Party.<sup>58</sup> *The Star* alleged that Archer had paid a prostitute £70 to have intercourse with

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48. *Id.* at 164-65.

49. *Id.* at 165.

50. *Times* (London), Dec. 17, 1987, at 2.

51. *Times* (London), Dec. 18, 1987, at 5.

52. *Times* (London), Dec. 17, 1987, at 2.

53. *Sunday Times* (London), July 20, 1986, at 1.

54. *Id.*

55. *Sunday Times* (London), Dec. 14, 1986, at 2.

56. *Times* (London), July 20, 1987, at 1.

57. *Id.*

58. *Times* (London), Mar. 21, 1987, at 2.

him.<sup>59</sup> Archer sued *The Star* and won £500,000<sup>60</sup>—a record amount for a defamation action in Britain.<sup>61</sup>

But Archer's record did not last for long. A short time later, Sonia Sutcliffe was awarded £600,000 in a libel action against *Private Eye*.<sup>62</sup> This award included both compensatory and punitive damages. *Private Eye* alleged that Mrs. Sutcliffe, the wife of the "Yorkshire Ripper,"<sup>63</sup> had been paid £250,000 by the *Daily Mail* to publish an account of her married life with Mr. Sutcliffe.<sup>64</sup> Interestingly, even though the story was inaccurate, *Private Eye's* counsel later alleged that it had some elements of truth. He claimed that Mrs. Sutcliffe had been paid £25,000 by the *Daily Mail* in a roundabout way, although he failed to specify the motive for the payment.<sup>65</sup>

### III. THE EFFECT OF BRITAIN'S DEFAMATION LAWS

How do Britain's libel laws affect the press and media?<sup>66</sup> Based on the *New York Times* decision and its discussion of the need for an actual malice standard, one might expect the British press to be fairly timid as compared to the U.S. press. There is no "breathing space" for errors. The threat, indeed the fact, of large judgments (e.g., the *Archer* and *Sutcliffe* judgments) should have a chilling effect on the newspapers and broadcasters. But does the theory comport with reality?

#### A. At First Glance: A Robust Media

At first blush, the British press and media seems to be remarkably robust. Britain has several recognized, quality newspapers including *The Guardian*, *The Independent*, and *The Times* (London). Britain also has an array of tabloids including the *Daily Star*, *Daily Mirror*, *Sport*, *Sunday Sport*, *Sun*, and *News of the World*, and in-between papers like the *Daily Mail* and *Express* that occupy a position leaning towards the quality end of the market.

Britain also has *Private Eye* magazine, a satirical magazine which often takes on the British royal family, as well as politicians and others

59. *Times* (London), July 25, 1987, at 1.

60. *Id.*

61. *Id.*

62. *The Financial Times* (London), May 30, 1989, at 44.

63. Her husband, Peter Sutcliffe, was convicted of committing a number of murders in Yorkshire. He was dubbed by the press the "Yorkshire Ripper."

64. *The Financial Times*, Oct. 9, 1989, at 48.

65. *Id.* Ultimately the jury's verdict was set aside by the Court of Appeal in *Sutcliffe v. Pressdram Ltd.* [1990] 1 ALL ER 269.

66. At the time of writing, the Lord Chancellor has announced a package of reforms which, if adopted, would meet some of the criticisms made in this article regarding the operation of British libel laws. Such reforms would require legislation which has not yet been drafted and may well be subject to modification in its progression through Parliament.

who might be regarded as members of the establishment. National Public Radio (U.S.) described *Private Eye* in the following way: "Every other week the British establishment gets a nasty case of the jitters. That's because a new edition of the satirical magazine *Private Eye* hits the stands. Reputations are rubbished with glee, official hypocrisy exposed with delight."<sup>67</sup> National Public Radio went on to state that: "[E]ven though it [*Private Eye*] still looks like it's laid out by badly hung-over undergraduates, it has become an institution, the gadfly buzzing the heads of state."<sup>68</sup>

Despite Britain's restrictive libel laws, the British press frequently makes hard-hitting allegations against British politicians and public figures. Illustrative is the following article that was published in *Private Eye*:

The arrogant, picket line crossing Labour member for Sheffield Attercliffe, Clive Betts, is a 42-year-old bachelor and professional politician who, like so many MPs in the People's Party, has never had to endure the sweat of a job in the real world outside politics.

In becoming a powerless backbencher, however, Betts has suffered a humiliating fall from grace after spending five years as leader of Sheffield city council. But that is nothing to the humiliation poll taxpayers have endured during his tenure as head of Britain's fourth-ranked provincial local authority.

Betts managed to achieve everything the Tories warned would follow a Labour general election victory: gross financial mismanagement engineered by a blundering executive setting high taxes with little return for the public, accompanied by the usual dollop of spineless but "worthy" posturing. It was no coincidence that Sheffield hosted Labour's ill-fated Nuremburg victory rally nine days before it lost the general election.<sup>69</sup>

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67. Bob Edwards, Morning Edition, National Public Radio (Oct. 15, 1991).

68. *Id.*

69. *Private Eye*, May 22, 1992, at 7. *Private Eye* also published the following article: "BRITISH GAS not only overcharges its customers (the watchdog Ofgas has just obliged it to reduce its charges) but its 'three star service' contract for domestic customers would appear to be an expensive con." *Id.* at 9. *Private Eye* made the following comment about a governmental organization: "When British Rail is privatised, will its dim staff adopt a less cavalier attitude to safety?" *Id.* at 9. Finally, it criticized the Labour Party:

Never keen to shoot itself in only one foot when both can be severely damaged, the Labour Party is now crumbling faster than the old east European bastions of socialism, circa 1989.

The catastrophic election defeat has been followed by the party's farcical leadership battle. But now it is possible the People's Party will finish the job completely and be declared bankrupt—not just intellectually, but financially too.

*Id.* at 7.



British newspapers also publish accusations about non-politicians.<sup>70</sup>

70. In a recent issue, it criticized other newspapers for their reporting:

The fantastic vendetta conducted by the Murdoch press against Carmen Proetta, a witness to the SAS shooting of three unarmed IRA members in Gibraltar in 1988, has reached a new low.

Last Sunday, the *News of the World* produced lurid allegations that Mrs. Proetta took money to provide fake passports, and the allegations were copied out by the *Sunday Times*. The *News of the World* story reads oddly and its details will be fully investigated in the weeks ahead.

Private Eye, May 22, 1992, at 5.

In the same issue, *Private Eye* published this piece:

WHO IS THE most avaricious lawyer in London? Just when it seemed the Peter Carter-Fuck Award for Most Outrageous Costs Charged in a Libel Action would be snatched by Mr. N.A. Chapman, a partner at pukka solicitors Frere Cholmeley, the award's eponymous founder has bounded in with a late but devastatingly inflated bid.

When a recent edition of the *Sunday Express* suggested all was not well at the Waddington Galley in London's Cork Street, the highly sensitive proprietor, Leslie Waddington, instructed Frere Cholmeley to bring proceedings unless an apology was received and the paper met his legal costs. The *Sunday Express* offered a "clarification" instead of an apology, which Waddington accepted, but only if the paper settled his solicitors' bill.

For writing three letters (two of which ran to two typed sheets), Frere Cholmeley charged £4,250. When the *Sunday Express* asked about the rate of charging, it was explained that the partner concerned, Mr. Chapman, had spent 15 hours dealing with the matter: five hours per letter.

Normally this would be a clear-cut Eat-your-heart-out-Farter Cuck Situation (*Shurely Carter-Fuck Situation? Ed*). But that would be to ignore the sad story of a veteran Labour activist who will probably have his home repossessed next month thanks to the wallet-boggling fees of Britain's most infamous libel lawyer.

John McDonnell, a former GLC councillor, has for several years been Labour's prospective parliamentary candidate in Hayes and Harlington, the seat occupied by the neanderthal Tory MP Terry Dicks. About 18 months ago, shortly before the Gulf War, McDonnell issued a leaflet criticising Dicks for alleged links with Iraq. Though the criticisms were made in good faith, based on an article in the *Observer*, they were inaccurate. Dicks issued a writ and the leaflet was withdrawn.

And that was the end of that—until this year, when Dicks moved his custom from his previous solicitors, Heald Nickinson, to Peter Carter-Fuck. Dicks was promised that his costs would be covered by the James Goldsmith Foundation, a fund administered by Carter-Fuck to bankroll establishment figures who wish to sue "subversives", and he immediately began pursuing the case in earnest. Shortly before the case was due to come to court, at the start of the general election campaign, McDonnell agreed to apologise and pay damages of £15,000—plus Dicks' costs, which he imagined would be no more than a few thousand pounds.

He had reckoned without the great libel lawyer. Carter-Fuck submitted a bill for costs of . . . £55,000! Since Carter-Fuck had agreed to the settlement only on condition that his costs wouldn't be taxed (ie assessed by a judge), this

Similarly hard-hitting articles can be found in other newspapers. In a recent article, the *Daily Mirror* claimed that a "DEVIL-worshipping sex fiend dubbed the Mongol Warrior was being hunted last night over the murder of gentle barmaid Harvell."<sup>71</sup>

The British tabloids give virtually unceasing attention to the British royal family often portraying it in an unfavorable light. For example, The Sun reported on a book about the marriage of Prince Charles and Princess Diana:

The 158-page book by Andrew Morton is described as "shocking" because it tells the truth.

*Charles is portrayed as uncaring and unloving, both as a husband and as a father to sons William and Henry.*

The book contains details of an alleged suicide attempt by the Princess, and fresh information about Charles's friendship with Camilla Parker Bowles.<sup>72</sup>

Moreover, in publishing these allegations, some papers seem relatively unconcerned about the threat of defamation suits. National Public Radio described *Private Eye* as follows:

While *Private Eye* has earned respect for its investigative journalism, it's also been roundly criticized for some fairly shoddy practices—among them, printing as fact gossip and rumor. Editor Ian Hislop frankly admits that he takes a rather cavalier attitude to the concept of fact checking.<sup>73</sup>

Since the British press publishes fairly hard-hitting articles on a regular basis, it might seem that Britain's failure to adopt an actual malice rule has had no real effect on the British press. British newspapers may be subject to libel actions from time to time, and they may end up on the wrong end of judgments or settlements, but they appear not to be profoundly affected by such judgments or settlements. On the contrary, they seem to carry on in a remarkably robust fashion and to regard libel actions as a business hazard that must be accepted as a cost of doing business rather than as a significant restriction on their coverage.

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amazing figure could not be challenged.

McDonnell's only asset is the flat which he co-owns with his girlfriend, Julia Devote, and which he had to pledge to Carter-Fuck in guarantee of settlement. Unless some other source of money can be found by 16 June, McDonnell and Devote will become homeless.

*Id.* at 11.

71. *Daily Mirror*, June 4, 1992, at 5.

72. The Sun, June 5, 1992, at 4 (emphasis in original).

73. Michael Goldfarb, National Public Radio, interviewing Ian Hislop for National Public Radio's Morning Edition (Oct. 15, 1991) [hereinafter Hislop Interview].

Some British editors go so far as to suggest that the U.S. press is, itself, far too timid. Ian Hislop, editor of *Private Eye*, flatly stated in a recent interview:

Hislop: The Americans are always very keen on fact checking. I've had a lot of lectures on fact checking.

Goldfarb: What have they said?

Hislop: They say, "You really should get a lot of interns and have them sit in a row and go through every piece and ring people up and say, is this true?" There is a problem in the area we work in—which is a fairly gray area, the area of printing stories which people don't want printed about themselves—is that they will say, "No, it isn't true."<sup>74</sup>

So, based on a preliminary analysis, one might question whether the *New York Times* decision was correctly decided. The British experience seems to indicate that an actual malice standard may not be necessary to a free press. Indeed, the British experience might suggest that, even without such a standard, the press can be fairly robust and aggressive.

### B. Probing Deeper

But is this view of the British press accurate? Do British editors really feel free to make hard-hitting allegations? Or is the image of a free and robust press and media somewhat deceiving? In an effort to ascertain the impact of Britain's libel laws, we conducted extensive interviews with newspaper reporters, editors, and defamation lawyers in both the United States and Britain.

The interviews suggested that the appearance projected by the British media is, at best, misleading. The British media frankly admits that defamation laws have a significant impact on its coverage. Every British editor and defamation lawyer we interviewed expressed serious concerns about the state of British law. A company solicitor felt that British law gave plaintiffs an "easy run" by making papers "guilty [of defamation] until proven innocent."<sup>75</sup> One editor complained that even quite small errors could lead to judgments.<sup>76</sup> Thames Television's counsel suggested that defamation cases are high risk because juries almost always find against media defendants,<sup>77</sup> even though only the strongest cases are

74. *Id.*

75. Interview with Alistair Brett, Company Solicitor, The Times (London), in London, England (June 3, 1992) [hereinafter Brett Interview].

76. Interview with Campbell Page, Executive Editor, The Guardian, in London, England (May 28, 1992) [hereinafter Page Interview].

77. Interview with Peter Smith, Head of Programme Legal Services, Thames Television, in London, England (June 4, 1992) [hereinafter Smith Interview].

ever litigated.<sup>78</sup> Thames' counsel also complained that defamation cases often result in relatively large judgments. Although Britain restricts recoveries in personal injury cases, it does not impose similar restrictions in defamation cases. This results in the anomaly that, even though a plaintiff who suffers personal injury might recover, say, £50,000 for a serious injury, the same person might receive as much as £500,000 if he is defamed.<sup>79</sup> This situation partly reflects the fact that England handles the two types of cases differently from a procedural perspective. Personal injury cases are now invariably dealt with by a judge sitting alone who relies on his own experience as well as on amounts awarded in prior cases. By contrast, defamation is one of the few areas of the law where juries are still the norm. Not surprisingly, some have suggested that the use of juries be curtailed in the interest of cost and efficiency.

British newspapers and broadcasters receive fairly large numbers of defamation complaints. Even quality newspapers, which are less inclined to sensationalize, regularly receive letters from solicitors regarding their coverage. These letters can average two or more per week.<sup>80</sup> If the paper or broadcaster feels that a statement was inaccurate, it will usually offer to retract the statement<sup>81</sup> and may offer to pay a small amount of damages.<sup>82</sup> Some papers make such retractions in response to about one-third of the letters they receive.<sup>83</sup> Of course, some matters cannot be settled and result in litigation, something which occurs about ten percent of the time.<sup>84</sup>

These letters and suits have had a dramatic effect on the functioning of British newspapers and broadcasters. Hislop, who expressed such

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78. *Id.* (suggesting that this occurs because the tabloids tend to cause both the public and judiciary to hold the press and broadcast media in disrespect). Others agreed. Interview with Tom Crone, Legal Manager, News International, in London, England (June 4, 1992) (at the trial court, newspapers are "likely to lose") [hereinafter Crone Interview].

79. Smith Interview, *supra* note 77.

80. Brett Interview, *supra* note 75 (The *Times* receives letters from solicitors at the rate of two to three a fortnight, and a writ about once a month); Crone Interview, *supra* note 78 (*News International* gets three to four letters per week, or 150 to 200 letters per year); Page Interview, *supra* note 76 (The *Guardian* receives somewhere between 100 and 120 letters from solicitors per year); Smith Interview, *supra* note 77 (Thames Television receives about 100 letters from solicitors per year).

81. *Id.*

82. *Id.*

83. Page Interview, *supra* note 76 (Of the 100-120 letters The *Guardian* receives from solicitors per year, it pays a small settlement sum in about 40 cases). However, Thames Television finds that they have an adequate defense, and are able to convince opposing solicitors of this fact, in nearly ninety-nine percent of all cases. Smith Interview, *supra* note 77.

84. Crone Interview, *supra* note 78 (of the 150 to 200 letters that *News International* receives per year, about ten percent evolve into writs); Smith Interview, *supra* note 77 (for every 100 or so demand letters received by Thames Television, about five writs were issued).

flippancy about fact checking, has been dramatically affected. As noted earlier, *Private Eye* suffered a £600,000 judgment in the Sonia Sutcliffe case. Following the judgment, Hislop expressed concerns about the ruinous nature of the judgment in an interview with *Morning Edition*:

Bob Edwards: *Private Eye* has a circulation of about 200,000.

Ian Hislop: That's right.

Bob Edwards: Can you begin to afford this kind of settlement?

Ian Hislop: No, obviously not.<sup>85</sup>

Nevertheless, Hislop expressed optimism that his readers would help bail him out:

Bob Edwards: You're trying to raise the money to cover this, aren't you, right now?

Ian Hislop: Yes, and we are desperately trying to get our readers to cough up.

Bob Edwards: And how's that going?

Ian Hislop: Well, there's a lot of money coming in, which is very good news. I am hopeful we're going to raise it and I am hoping that we will win our appeal on the grounds that this is a perverse award. But I'm not sold on the fact that the law will bail us out. I have very little confidence in the law. I have a feeling that our readers might be more reliable than the workings of the legal system.<sup>86</sup>

At present, *Private Eye* continues to publish.

The threat of defamation actions affects day-to-day news coverage. As a rule, the media finds that the most efficient way to avoid retractions and damage settlements is by acting with extreme caution. Newspapers and broadcasters can insure themselves against defamation losses, but few find it feasible to do so.<sup>87</sup> Insurance is often expensive,<sup>88</sup> and usually carries a very high deductible,<sup>89</sup> so all publishers find that the best way to protect themselves is through careful reporting.

But the thoroughness of the review process is startling. Most newspapers and broadcasters have teams of lawyers who review each day's paper or program for material that might be defamatory. *The Guardian*, for example, has several lawyers who review each day's paper before

85. Bob Edwards, National Public Radio's Morning Edition, interviewing Ian Hislop, Editor, *Private Eye* magazine (Mar. 3, 1992).

86. *Id.* See *supra* note 65. The action was ultimately settled for a sum in excess of £90,000; [1990] ALL ER 269 at 295.

87. Page Interview, *supra* note 76.

88. *Id.*

89. Smith Interview, *supra* note 77. The Guild of British Newspaper Editors survey found that there had been an increase in the percentage of papers which carried insurance from fifty-eight percent in 1990 to seventy percent in 1991. Insurance premiums had increased for thirteen percent of those insured; *infra* note 137.

it is published.<sup>90</sup> *The Times* has an in-house staff of three solicitors who perform this task and also employs a barrister who comes in during the evening to make spot checks.<sup>91</sup> Thames Television has two lawyers who spend up to seventy percent of their time on defamation issues.<sup>92</sup> These two lawyers cannot review all programs, but they try to review as many as they can, and they make a special point of reviewing high-risk investigative programs.<sup>93</sup>

If a lawyer flags an article as potentially defamatory, a secondary review process is then triggered. At most newspapers, editors (and sometimes lawyers) meet with reporters who wrote the story in an effort to determine the basis for allegations.<sup>94</sup> Throughout the process, the focus is on legal sufficiency.<sup>95</sup> Counsel for News International stated that he focuses on three basic issues: (1) Is the statement true? (2) Can he prove it? and (3) Is the person mentioned likely to file suit?<sup>96</sup> Other organizations use similar criteria.<sup>97</sup>

All media organizations indicated that, as a matter of journalistic ethics, they did not want to print or broadcast anything that is untrue. But all stated that they were not able to publish everything that they believed was true. Most focused on whether, if their organization was called on to account for a story, it would have legally admissible evidence with which to defend itself.<sup>98</sup> At Thames Television, one of the solicitors meets with the editor and reporter in an attempt to determine the basis for any allegations that are made.<sup>99</sup> This is a cooperative process under which the solicitor tries to understand and accommodate the needs of program makers.<sup>100</sup>

But the process is also pragmatic. Editors consider whether, even if evidence is admissible, the sources are willing to go "into the box" and testify. Editors might be reluctant to rely on evidence learned from a source they cannot expose,<sup>101</sup> or who is likely to go "wobbly."<sup>102</sup>

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90. Page Interview, *supra* note 76.

91. Brett Interview, *supra* note 75; Crone Interview, *supra* note 78 (*News International*, which controls a number of papers including the *Sun* and the *Times*, also has a lawyer who comes in at night to review "every sentence with legal danger").

92. Smith Interview, *supra* note 77.

93. *Id.*

94. Brett Interview, *supra* note 75; Crone Interview, *supra* note 78; Page Interview, *supra* note 76; Smith Interview, *supra* note 77.

95. *Id.*

96. Crone Interview, *supra* note 78.

97. Smith Interview, *supra* note 77.

98. *Id.*

99. *Id.*

100. *Id.*

101. Brett Interview, *supra* note 75; Crone Interview, *supra* note 78.

102. Brett Interview, *supra* note 75.

Editors will also consider whether information was learned under the "lobby system," and is therefore deemed to be off the record,<sup>103</sup> and whether the subject of the article is someone who is likely to sue.<sup>104</sup> Some individuals are particularly litigious.<sup>105</sup> As to these individuals, editors are less inclined to take risks.<sup>106</sup>

After considering this *mélange* of factors, editors decide whether to publish. This decision is often a "team" decision involving the editor and the reporter as well as, perhaps, the head of the department.<sup>107</sup> This process can produce a variety of results. Although editors sometimes decide to scrap a piece,<sup>108</sup> this option is rarely chosen.<sup>109</sup> More commonly, editors try to save a piece by rewriting or altering it in a way that will limit their exposure.<sup>110</sup> In rewriting a piece, editors may delete segments that are not legally supportable,<sup>111</sup> present the subject in a more balanced fashion,<sup>112</sup> or change a statement of fact to an opinion in order to make the statement a "comment" and thereby invoke the privilege of fair comment.<sup>113</sup>

Even though few stories are scrapped, Britain's defamation laws take an inevitable toll on political reporting. Editors will print allegations against public officials, but they rarely do so except when there is strong supporting evidence.<sup>114</sup> One editor referred to the Wilbur Mills' tidal basin incident that occurred in the United States.<sup>115</sup> He suggested that the facts in that case were so strong that, had a similar incident occurred in Britain, it would have been widely reported and the subject of much comment. Indeed, the British Wilbur would probably have been the subject of much derisive comment.

However, a very different picture emerges when British editors are asked about a case like Watergate. That case was slow developing and was initially based on inside sources who were unwilling to be named.

103. The Prime Minister's private secretary may brief the political editors of Britain's national newspapers. These briefings, which were once rendered in the lobby and therefore referred to as the "lobby system," are usually "off the record." Nevertheless, editors obtain much salient, and sometimes juicy, information. *Id.*

104. Crone Interview, *supra* note 78.

105. *Id.*

106. Smith Interview, *supra* note 77.

107. Brett Interview, *supra* note 75.

108. Page Interview, *supra* note 76.

109. Brett Interview, *supra* note 75; Page Interview, *supra* note 76; Smith Interview, *supra* note 77 (the interviewee could only remember one instance in which Thames Television was forced to "kill" a program in its entirety).

110. Brett Interview, *supra* note 75; Page Interview, *supra* note 76.

111. Brett Interview, *supra* note 75.

112. Smith Interview, *supra* note 77.

113. Brett Interview, *supra* note 75.

114. Page Interview, *supra* note 76.

115. *Id.*

In some instances, sources were unknown even to the reporters themselves, and were unwilling to be publicly revealed. Thus, it was difficult for editors and publishers to produce legally admissible evidence substantiating their allegations of misconduct. Nevertheless, the Watergate story was published in the United States. Would the same type of story have been reported in England? British editors and defamation lawyers uniformly stated that, without legally admissible evidence, they would have been unable to print such allegations.<sup>116</sup> Even the *Sun* newspaper, one of the tabloids, suggested that it would have been "reluctant to run" such a story.<sup>117</sup> Moreover, if a libel suit had been brought, news sources might have "dried up." The sources, who in the Watergate case were governmental insiders, might have feared retaliation and refused to provide further information. As a result, the investigation might not have continued to conclusion and the full extent of the scandal might never have been revealed.

The "chilling" effect of British defamation law is dramatically revealed by the case of Robert Maxwell, the British publishing magnate who died mysteriously off the coast of the Canary Islands in 1992. Following his death, it was discovered that he had suffered serious financial reverses. In addition, he had looted his companies, thereby causing major losses to British pensioners. Some have suggested that Maxwell's financial problems would have come to light earlier except for Maxwell's litigious nature, which caused the British press to be reluctant to make allegations against him.<sup>118</sup> As a result, the extent of Maxwell's problems were not revealed until after his death.

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116. *Id.*

117. Crone Interview, *supra* note 78.

118. Columnist Anthony Lewis summarized the situation as follows:

How could he get away with it for so long? That is the question posed by the collapse of Robert Maxwell's empire so quickly after his death.

For years he ran what amounted to an international confidence game, borrowing more and more, covering up his accounts. An official British inquiry in 1971 found him unfit to be in charge of a public company.

Yet politicians honored him; and newspapers printed his boasts, hollow though most of them turned out to be.

The Financial Times of London said last week that Maxwell was not some unimportant figure; his operations affected large interests and many people. "How was it," the paper asked, "that he was able to play such a role, for so many years, with such apparently cavalier disregard for the normal standards of probity? How could some of the world's leading banks lend so much money to him?"

It was British corporate regulatory law that failed, the Financial Times said. Yes, it did.

But there was another reason why Maxwell escaped proper scrutiny for so long: Britain's stringent libel law, which makes it dangerous to write critically



British editors and lawyers flatly stated that they were well aware of Maxwell's litigious nature,<sup>119</sup> and that they were quite careful about their reporting on him.<sup>120</sup> One defamation lawyer stated that the British media was "scared" of Maxwell because he used the libel laws "savagely."<sup>121</sup> Another lawyer indicated that he routinely demanded proof that "one hundred percent" of all allegations made against Maxwell were accurate.<sup>122</sup> Alistair Brett, Company Solicitor for the London *Times*, flatly stated that Maxwell was quick to serve defamation writs, and that he would do so if the newspaper got so much as a word wrong.<sup>123</sup>

British editors confirmed that Maxwell's litigious nature affected their reporting on him.<sup>124</sup> Repeatedly, the media indicated that Maxwell's threats had a chilling effect which prevented them from publishing allegations that could not be proved easily in court.<sup>125</sup> Publishers would make allegations against Maxwell when they had strong evidence to support their allegations. But when the media lacked compelling proof, it would not publish. Thus, the media withheld items that would have been aired against someone who was less litigious.<sup>126</sup> Editors were much more willing to print allegations against Rupert Murdoch, another British publishing magnate, who is less litigious.<sup>127</sup> The net effect is that many things that were known about Maxwell went unreported, including his financial reverses.<sup>128</sup>

Of course, some British papers may regard defamation judgments as simply a cost of doing business, and therefore may engage in aggressive

about a scoundrel like Maxwell.

Whenever anyone suggested wrongdoing by Maxwell, he sued. He brought 21 libel actions against the authors and others connected with two biographies of him. He sued the BBC, Rupert Murdoch, the editors of half a dozen English newspapers.

The threat of a libel suit is so potent in silencing critics in Britain because the law is so favorable to libel plaintiffs. Nearly everyone who sues the press gets a cash settlement or wins a jury verdict at trial—and keeps it on appeal.

Anthony Lewis, *Britain's Plaintiff-Friendly Libel Laws Shielded Maxwell's Scams From Scrutiny*, L.A. Daily J., Dec. 16, 1991, at 6; O'Connor, *supra* note 42, at 22 (Maxwell, who is now known to have looted the pension fund of the *Daily Mirror*, used frequent lawsuits to discourage negative press coverage of his activities. The suits tied up publications in lengthy and expensive litigation).

119. Brett Interview, *supra* note 75.

120. *Id.*

121. Smith Interview, *supra* note 77; see also Crone Interview, *supra* note 78 (media was "afraid" of Maxwell).

122. Crone Interview, *supra* note 78.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Smith Interview, *supra* note 77.

128. *Id.*

investigative reporting despite the threat of liability.<sup>129</sup> Perhaps these papers sensationalize, even though they know that they are taking risks,<sup>130</sup> in order to gain a competitive advantage.<sup>131</sup> They hope they can net enough additional revenue to pay defamation claims and still make a profit.<sup>132</sup> The tabloids themselves suggest that they do not engage in such cost-benefit analysis. Thomas Crone, the Legal Manager for News International, which owns *The Sun*, claims that the risk from defamation actions is simply too great.<sup>133</sup> In addition, he claims that it is difficult to predict which stories will produce major circulation increases.<sup>134</sup> There are fantastic stories which produce no significant increase in sales.<sup>135</sup>

Britain's defamation laws do, however, have one positive effect: they encourage newspapers and broadcasters to make sure their reporting is even-handed. Because they fear the possibility of liability, British editors tend to check and recheck their stories. In addition, they tend to rewrite articles to make sure their coverage is balanced.<sup>136</sup> For example, the *Guardian* appears to be particularly careful about balance. If the *Guardian* has contrary information in its possession, it is likely to place that information closer to the beginning of the piece rather than at or near the end.

A recent study by the Guild of British Newspaper Editors supports these conclusions.<sup>137</sup> The Guild surveyed regional newspapers. Eighty percent of those who replied to the Guild's questionnaire were weekly or biweekly publications, and thirty-eight percent of those responding distributed their papers for free, suggesting that the respondents represented a somewhat different segment of the market than the national dailies. Based on this difference, one might surmise that weekly and biweekly publications, especially those that are distributed for free, would be involved in far less libel litigation than the national dailies. This surmise was partially borne out by the fact that most respondents replied that they had suffered either no increase or only a slight increase in the number of defamation complaints leveled against them. Nevertheless, those who did complain to the newspapers were more likely to have consulted a lawyer first rather than to have approached the newspaper directly. Interestingly, the responding newspapers indicated that defa-

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Crone Interview, *supra* note 78.

134. *Id.*

135. *Id.*

136. Smith Interview, *supra* note 77.

137. Editors and Libel Claims, A Report on Libel Claims Against Regional Newspapers (1992).

mation complaints most commonly involved court reporting and, although a majority of respondents planned to continue reporting on judicial proceedings, ten papers had chosen to reduce their coverage in this area. In addition, thirteen titles, seven percent of the sample, had received libel writs during 1991 although none proceeded to trial. Of the actions that were settled, the highest payment was for £20,000. Twenty-five percent of the respondents indicated that they sought pre-publication advice more frequently in 1991 than in prior years.

Finally, it is important to emphasize that libel litigation may increase in the future rather than decrease. There are two reasons. Professor Soothill's recent study,<sup>138</sup> focusing on press coverage of libel cases, noted that there is a "curiously symbiotic relationship [between] newspapers [and defamation]. In part, it helps to control newspapers but also, in spectacular cases, it helps to sell newspapers."<sup>139</sup> It is tempting to conclude that press coverage of spectacular cases tends to spur future litigation by enhancing public awareness of the availability of libel law and its utility to individuals who have been defamed.<sup>140</sup> An increase in defamation litigation may also be stimulated by the recent decision in *Joyce v. Sengupta*.<sup>141</sup> In the past, libel litigation has been restrained by the high cost of such litigation, as well as by the fact that Legal Aid cannot be used to cover the cost of this type of action.<sup>142</sup> *Joyce* held that defamatory statements may be actionable as malicious falsehood for which Legal Aid is available. At the moment, there is uncertainty about the level of damages that may be recovered for malicious falsehood, or whether those damages will equal those recoverable for defamation. Nevertheless, *Joyce* opens the door to more, rather than less, litigation against newspapers.

### C. Exploiting Privileges

Because of their fear of defamation suits, British newspapers and broadcasters have become remarkably adept at finding "safe" ways to get material into print. They report freely on the British royal family, which rarely sues for defamation. They also report fairly freely on cabinet ministers who, by custom, cannot sue for defamation without

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138. Keith Soothill, *Libel in the News*, 142 New L.J. 1337, 1390 (1992).

139. *Id.* at 1337.

140. This conclusion is not expressly drawn in Professor Soothill's study.

141. [1993] 1 ALL ER 897.

142. Legal Aid is a fund provided by the State to assist those with limited means in bringing suits. In certain cases, plaintiffs are not required to contribute anything toward the cost of the suit and are not obligated to pay the other side's costs even if they lose. Obviously, given these circumstances, Legal Aid plaintiffs have considerable leverage. However, the threshold of impecuniosity required to qualify for Legal Aid is very low.

first gaining clearance.<sup>143</sup> Of course, this custom provides publishers with only a limited reprieve. Once ministers relinquish their cabinet posts, they are free to sue regarding defamatory statements made while they were in office.<sup>144</sup>

The British media also takes advantage of various privileges including the absolute privileges for accurate reporting of parliamentary debates<sup>145</sup> and judicial proceedings.<sup>146</sup> Indeed, many hard-hitting pieces are carefully sculpted pieces based on statements rendered in privileged contexts.<sup>147</sup>

The British media's tendency to base allegations on testimony heard in courts or in parliament is somewhat disturbing. Obviously, it is desirable for the media to report what transpires in these two contexts. But in a free society, one would prefer to have a more robust media that does its own investigations and reports freely the results. Obviously, Britain does have investigative journalists. However, as the Watergate and Maxwell examples suggest, Britain's press reports less freely.

To its credit, the British press is remarkably adept at manipulating and taking advantage of the various privileges. When newspapers gain information about a scandal, but feel they do not have enough legally admissible evidence to support their allegations, they sometimes ask an MP to raise the matter during "question time" in Parliament.<sup>148</sup> The press is then free to report on the question and the response, if any. If the paper feels strongly enough about a matter, they might ask an MP to schedule a matter for an "early day motion"—a motion suggesting that a matter has troubling implications and should be investigated.

But despite the British press' resourcefulness, it is unable to report on many matters of public interest. The press must have sufficient evidence of wrongdoing before it can ask an MP to ask a question or to file an early day motion. Of course, part of the problem is that some of the most important allegations seem fairly preposterous in the beginning. This was true of Watergate until a sufficient mass of proof was developed. But how is the proof to be developed under England's

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143. Brett Interview, *supra* note 75; Smith Interview, *supra* note 77.

144. Brett Interview, *supra* note 75.

145. Rogers, *supra* note 16, at 333.

146. *Id.* at 333-34.

147. The following is illustrative:

Two Kray twin copycats hatched an amazing plot to kidnap soccer hero Paul Gascoigne, a court heard yesterday.

Would-be gangsters Lindsay and Leighton Frayne allegedly recruited Gazza's bodyguard and driver—ex-SAS man Paul Edwards—to snatch the star.

The plot was revealed at Newport Crown Court where the brothers are accused of robbery and conspiracy.

Daily Mirror, June 4, 1992, at 1.

148. Brett Interview, *supra* note 75; Smith Interview, *supra* note 77.

system? Absent sufficiently credible support, MPs might be reluctant to ask questions for fear they might not be taken seriously.

#### IV. COMPARISON TO THE UNITED STATES

Once the British interviews were complete, we then interviewed U.S. editors, reporters, and defamation lawyers in an effort to find out whether they functioned differently than their British counterparts.

##### A. *The Doomsday Scenario*

Although we believed that U.S. newspapers and broadcasters would be much more relaxed about the possibility of defamation suits, there was reason to suspect that our belief was wrong. The *New York Times* decision did not terminate libel litigation. On the contrary, many continued to sue. Some plaintiffs felt wronged and hoped they would prevail, but many who did not necessarily expect to prevail had nevertheless filed libel actions. There were many reasons. Some of these plaintiffs were economically motivated. They hoped to gain modest settlements from defendants who wished to avoid the cost of litigation.<sup>149</sup> But others were motivated by non-economic factors such as the hope of clearing their names.<sup>150</sup>

Some argue that libel litigation continues unabated,<sup>151</sup> and indeed is on the increase.<sup>152</sup> As one commentator noted, “[A]n astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money.”<sup>153</sup>

149. David A. Anderson, *Libel and Press Self-Censorship*, 53 *Tex. L. Rev.* 422, 435 (1975).

150. *Id.*

151. See Epstein, *supra* note 8, at 783.

152. *Id.*; see also Lewis, *supra* note 3, at 603 (“This is an appropriate time to think again about that great case. It is a time of growing libel litigation, of enormous judgments and enormous costs”).

153. Smolla, *supra* note 10, at 1. The situation was summarized by one commentator as follows:

Among the public officials joining the litigation feast have been Philadelphia Mayor William J. Green, who sued a CBS television station for \$5.1 million for reporting that he was under federal criminal investigation; former Governor Edward J. King of Massachusetts, who filed a \$3.6 million suit against the *Boston Globe* for implications conveyed by articles, editorials, and political cartoons that King was “unfit and incapable of properly performing the duties of governor”; Governor William J. Janklow of South Dakota, who filed a \$10 million suit against *Newsweek* for an article allegedly implying that he had raped an Indian girl; former United States ambassador to Chile, Nathaniel Davis, and two of his ex-assistants, who filed a \$150 million suit against the makers of

Even though there were virtually no recoveries in the first years after *New York Times* was decided, that situation has now changed.<sup>154</sup> Anthony Lewis recently claimed that "publishers are not dancing in the streets today,"<sup>155</sup> and offered several examples:

Last July [1982] a jury in Washington, D.C., awarded over \$2 million to the president of the Mobil Oil Corporation, William Tavoulaareas, for a *Washington Post* story stating that he had "set up his son" in a shipping management firm that did business with Mobil. Carol Burnett, the actress, won \$1.6 million from the *National Enquirer*. A former Miss Wyoming won \$26.5 million from *Penthouse Magazine*, reduced by the trial judge to \$14 million, but the entire award was set aside on appeal. Newspapers in San Francisco and Oklahoma City and Alton, Illinois have faced judgments in the millions.<sup>156</sup>

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*Missing*, alleging that the 1982 film implied that the American embassy was connected with the killing of an American free-lance writer during the 1973 coup d'etat in Chile; and General William Westmoreland, who has sued CBS for allegedly suggesting his complicity or incompetence in connection with the underestimation of enemy troop strength levels in Vietnam. Even former President Jimmy Carter was prepared to join the list by suing the *Washington Post* for a gossip column item relaying rumors that Blair House had been bugged during Ronald and Nancy Reagan's residence there before Reagan's inauguration. Carter chose not to take action after his public threat of suit was enough to force a retraction from the *Post* and a published letter of apology.

Public interest advocates who are prominent among the list of recent libel plaintiffs include Ralph Nader, who sued Ralph de Toledano for statements de Toledano made in a syndicated column about Nader's crusade against the lack of safety in General Motors' Corvair, and feminist attorney Gloria Allred, who filed a \$10 million libel suit against a California State Senator because of a characterization in a press release.

Entertainers, writers, and other media figures have also contributed to the recent resurgence of the libel suit. Carol Burnett's \$10 million libel action against the *National Enquirer*, and the \$1.6 million verdict returned by the jury, although later reduced by the court, obviously added great impetus to the trend. There have, however, been many others. Wayne Newton sued NBC over a report linking him to organized crime, and Elizabeth Taylor filed a complicated action against ABC over a "docu-drama" that depicts Taylor's life. Writer Norman Mailer filed a \$7 million libel suit against the *New York Post*, claiming that the newspaper defamed him in reports about the trial of writer Jack Henry Abbott. Kimerli Jayne Pring, Miss Wyoming of 1978, was awarded \$26 million (later reversed on appeal) by a federal court jury in a suit against *Penthouse* magazine. Even E. Howard Hunt has sought the refuge of the courts to rehabilitate his reputation; Hunt was awarded \$650,000 in damages by a federal jury in Miami against a weekly newspaper called the *Spotlight*, for a story that linked Hunt to the assassination of John F. Kennedy.

*Id.* at 2-4.

154. See Lewis, *supra* note 3, at 608.

155. *Id.*

156. *Id.*

Because the threat of litigation continues to exist, one might speculate that U.S. libel laws force editors to engage in a degree of self-censorship.<sup>157</sup> Obviously, any litigation can be expensive. But libel litigation is particularly expensive. The actual malice standard encourages plaintiffs to seek extensive discovery of editorial decision-making processes.<sup>158</sup> This discovery can take years and cost millions of dollars to complete.<sup>159</sup> In addition, defendants lose many defamation cases at the trial court level. Even though they win most of these cases on appeal, they must bear the cost of the appeal.<sup>160</sup> Moreover, the number of judgments that are sustained on appeal has increased.<sup>161</sup>

Because of these risks, one might suspect that U.S. editors would not be free and uninhibited in their coverage. Even editors who believe they will ultimately prevail in a libel action may be deterred from publishing hard-hitting allegations fearing the costs of defending a possible action.<sup>162</sup> Some publishers may be well financed sufficiently that

157. Anderson, *supra* note 149, at 430-31 ("Nevertheless, self-censorship remains. Its full extent is impossible to determine. Much of it is inherently unmeasurable; it occurs whenever a reporter or editor omits a word, a passage, or an entire story, not for journalistic reasons but because of the possible legal implications").

158. *See supra* note 11.

159. *See Lewis, supra* note 3, at 611-12 (in *Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635 (1979), discovery took eight years, and CBS spent between \$3 million and \$4 million in legal fees).

160. *Id.* at 613:

The leaked secrets of the jury room are not likely to help the *Post* on appeal. But they give us dramatic evidence in support of a conclusion that libel lawyers had already reached: When a case goes to a jury, the *Sullivan* rule means little or nothing. All those phrases designed by the Supreme Court to protect freedom of speech and press may not in fact be applied. When a judge's charge lasts an hour or more, and one sentence speaks of the need to find "reckless disregard," it rolls right past the jurors—it would roll past any of us. In the real world, too, jurors are part of a public that is not very fond these days of the institutions that are usually libel defendants: big newspapers and magazines and broadcasters. They think that those media giants can afford hefty damages and might as well pay. In the brief hearing that Judge Gasch held after the return of the \$250,000 compensatory judgment for Tavoulaareas, the jury heard testimony about the healthy profits of the Washington Post Company, and Tavoulaareas testified that he had spent \$1.8 million on lawyers' fees in this case. The jury took a few minutes to fix punitive damages at \$1.8 million.

161. *Id.* at 603.

162. *See Anderson, supra* note 149, at 431 (Describing an editor who deleted several passages from an article: "The review had consulted its lawyers, who advised that it would probably win a libel suit, 'but that the cost of defending it might easily bankrupt the magazine. After a good deal of agonizing, . . . we decided the risk was not worth it.'" The article notes that a book was withdrawn from the market because of the threat of a libel action); Lewis, *supra* note 3, at 614 ("Any sensible publisher of comment on official conduct must worry today about the legal process and its expense").

they are undeterred by these potential costs, and are willing to publish notwithstanding the threat of litigation.<sup>163</sup> But many small publishers would be devastated by a large award. Moreover, even some large publishers indicate their uneasiness by requiring authors to agree to indemnify the publisher in the event of a defamation action.<sup>164</sup> These agreements may encourage the authors themselves to engage in self-censorship.<sup>165</sup>

### B. *The Interviews*

These dire assessments of the state of U.S. libel were not, however, borne out by the interviews. U.S. editors are concerned about the threat of defamation actions and the possibility of adverse judgments, but they are far less concerned about this possibility than their British counterparts. For example, Bob Edwards of National Public Radio's Morning Edition flatly stated that defamation laws had no impact on his coverage.<sup>166</sup> Others agreed.<sup>167</sup> In fact, only one interviewee, a lawyer for a

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163. Anderson, *supra* note 149, at 432.

164. *Id.* at 433-34:

In book publishing, and to a lesser extent in magazine publishing, the economic pressures for self-censorship are exacerbated by the practice employed by many companies of requiring authors to agree to indemnify their publishers for some or all of the losses resulting from libel suits. In some cases the writer promises only to indemnify ultimate judgments. Other agreements require him to pay the judgment and a specified portion of the costs of defending all suits, whether successful or unsuccessful. Still others require him to bear all costs of litigation as well as pay any settlement or judgment. At least one major underwriter of libel insurance insists that its policyholders obtain indemnification agreements from writers. Some publishers and insurers maintain that the losses caused by libelous statements should be borne by those writing them and that indemnification provides insurers with their only means of protection against irresponsible writers. This argument, however, is untenable when indemnification is not limited to ultimate judgments. To require the author to bear the costs of successfully defending a suit deters him not only from writing libelous statements, but also from writing statements that, although not libelous, may nevertheless be the subject of a suit. For the authors these defense costs are overwhelming. In the instance of the six books mentioned above, the authors reported defense costs ranging from \$10,000 to \$19,000, figures that represented twenty-five to 100 percent of their royalties.

165. Newspapers and broadcasters do have incentives which encourage them to report items of public interest notwithstanding the threat of a libel suit. The most important incentive is their professional ethic and their desire to provide the public with necessary information. *Id.* at 434 ("Reporters and editors share a professional ethic that encourages them to seek to inform the public, even at the risk of libel litigation"). But whether this ethic prevails in a battle between the ethic and economic realities, is unclear. *Id.*

166. Interview with Bob Edwards, Host, National Public Radio's Morning Edition, at Washington, D.C. (July 23, 1992) ("zip" impact) [hereinafter Edwards Interview]; Telephone Interview with David Gelber, Executive Producer, 60 Minutes (Oct. 13, 1992)



major network, expressed any serious concerns about the impact of U.S. defamation laws.<sup>168</sup>

The reason U.S. newspapers and broadcasters are less concerned about defamation is because they are threatened with suit, and actually sued, far less frequently than their British counterparts.<sup>169</sup> The *Louisville Courier-Journal* is, for example, sued only once every two years or so.<sup>170</sup> The *Washington Post* receives three or four letters a year from lawyers threatening suit, but is rarely sued.<sup>171</sup> Although the *New York Times* may receive one letter a month from lawyers, it is sued only about once a year.<sup>172</sup> Bob Edwards was unable to state whether National Public Radio had ever received threatening letters or had been sued.<sup>173</sup> David Gelber, the Executive Producer of the CBS program *60 Minutes*, has only been sued twice in his eight years with that program.<sup>174</sup>

Editors and producers in the United States are not so relaxed that they ignore the possibility of defamation liability. But, because the threat of suit is much lower, they often tend to be more worried about other matters (e.g., journalistic accuracy and integrity) than they are about the threat of liability.<sup>175</sup> Producers and editors stated that for professional reasons, they want to report accurately.<sup>176</sup> Even if there is no threat of

(does not remember ever calling a story for fear of defamation liability) [hereinafter Gelber Interview].

167. Telephone interview with Stephen Friedman, Executive Producer, NBC Nightly News with Tom Brokaw (Sept. 22, 1992) [hereinafter Friedman Interview]; Telephone Interview with Jim Mitchell, News Anchor, WDRB Television, in Louisville, Ky. (July 8, 1992) (for local news programs, most of what they report on raises little or no defamation problems. Problems arise most frequently with regard to investigative stories) [hereinafter Mitchell Interview]; Telephone interview with Walter Porges, Vice President for News Practices, CBS (Sept. 22, 1992) (CBS gets sued "sometimes." Mostly, they get angry letters or calls") [hereinafter Porges Interview].

168. Telephone Interview with John Zucker, Staff Counsel, Central Broadcasting System (CBS) (Oct. 12, 1992) [hereinafter Zucker Interview]. For a discussion of Zucker's concerns, see *infra* discussion accompanying notes 190-192, 217-220.

169. Friedman Interview, *supra* note 167; Mitchell Interview, *supra* note 167 (WDRB Television may receive two letters from lawyers a year regarding its coverage, and is hardly ever sued); Porges Interview, *supra* note 167 (CBS gets sued "sometimes." Mostly, they get "angry letters or calls").

170. Interview with Hunt Hale, Louisville Courier-Journal, in Louisville, Ky. (July 1, 1992) [hereinafter Hale Interview].

171. Telephone interview with Mary Ann Werner, Assistant Counsel, Washington Post (July 6, 1992) [hereinafter Werner Interview].

172. Telephone interview with George Freeman, Senior Counsel, New York Times (July 7, 1992) [hereinafter Freeman Interview].

173. Edwards Interview, *supra* note 166. Theodora Brown stated that National Public Radio receives threatening letters very infrequently, perhaps once a year. Interview with Theodora Brown, Assistant General Counsel for National Public Radio, at Washington, D.C. (July 23, 1992) [hereinafter Brown Interview].

174. Gelber Interview, *supra* note 166 (One of those cases is pending. The other was dropped).

175. Edwards Interview, *supra* note 166 (Edwards relates an incident in which an

liability, they want to avoid publishing something that is untrue or that cannot be supported by hard evidence.<sup>177</sup> Thus, at times, they know things they do not report. But the primary reason for withholding such information is that the editors are concerned about the ethics of publishing it. They also fear that questionable allegations might diminish their credibility or harm their standing in the community.<sup>178</sup>

Some argue that it is difficult to differentiate between what is done for reasons of journalistic integrity and what is done for fear of defamation liability.<sup>179</sup> For example, David Gelber, producer of CBS's *60 Minutes*, stated that few situations would arise when he might be fearful of liability when he would not also have concerns about whether he was being fair as a journalist.<sup>180</sup> Others agreed, arguing that, if they live up to journalistic ideals, they have little to fear in terms of defamation liability.<sup>181</sup>

These attitudes are reflected in the day-to-day functioning of U.S. newspapers and broadcasters. Unlike the British, U.S. newspapers and broadcasters do not have teams of lawyers that comb through copy searching for material that may be defamatory.<sup>182</sup> Most papers and broadcasters allow editors and producers to decide for themselves whether material is potentially defamatory and whether to involve counsel.<sup>183</sup> If an editor or producer feels comfortable with a piece, he may publish or air it without any input from counsel.

When U.S. editors or producers involve their lawyers, they use a process that is similar to that used by their English counterparts. The

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interviewee alleged that the head of a conservative political action committee frequented gay parties. Edwards contacted the subject of the allegation who threatened to sue if Edwards aired the allegation. Ultimately, Edwards decided not to air. However, his decision was based on concern for journalistic accuracy rather than from the threat of suit); Freeman Interview, *supra* note 172; Gelber Interview, *supra* note 166; Hale Interview, *supra* note 170; Mitchell Interview, *supra* note 167; Telephone interview with Jennifer Weiss, Staff Counsel, Cable News Network (CNN) (July 9, 1992) [hereinafter Weiss Interview].

176. Edwards Interview, *supra* note 166; Freeman Interview, *supra* note 172; Hale Interview, *supra* note 170; Weiss Interview, *supra* note 175.

177. Weiss Interview, *supra* note 175.

178. Hale Interview, *supra* note 170.

179. Gelber Interview, *supra* note 166.

180. *Id.*

181. Freeman Interview, *supra* note 172; Hale Interview, *supra* note 170.

182. There are some exceptions. CBS routinely asks legal counsel to review investigative programs. Porges Interview, *supra* note 167. In addition, those who publish internationally may be more inclined to use prepublication lawyer reviews routinely. Weiss Interview, *supra* note 175. But they do so because of the risk under foreign laws. *Id.*

183. Freeman Interview, *supra* note 172; Friedman Interview, *supra* note 167; Hale Interview, *supra* note 170; Mitchell Interview, *supra* note 167; Porges Interview, *supra* note 167; Werner Interview, *supra* note 171.

attorney examines the statement and examines the reporter's sources in an effort to ascertain whether there is adequate evidence to support the assertion.<sup>184</sup> In some instances, the attorney may urge the paper to do additional investigative work.<sup>185</sup> In other instances, the lawyer may recommend that part of a piece be rewritten or softened<sup>186</sup> or that an effort be made to present something in a more balanced way.<sup>187</sup> Nevertheless, if there is adequate evidence to support a claim, something will be printed or broadcast even though it contains hard-hitting allegations.<sup>188</sup>

Thus, the possibility of defamation suits has some impact on reporting. But most interviewees indicated that the impact was minimal. Few editors or producers reported that they had ever killed a story for fear of defamation liability.<sup>189</sup> Moreover, few indicated that they were unable to make a statement for fear of liability. They were often reluctant to rely entirely on confidential sources.<sup>190</sup> In addition, if they had inadequate support for a piece, they might seek additional support.<sup>191</sup> Alternatively, they might soften a statement<sup>192</sup> or attempt to present it in a more balanced way. But there was a very good chance that the allegation would still be made.

Even those who have been defendants in defamation litigation do not seem unduly chilled by the threat of additional litigation. Brian Ross, an NBC correspondent, suffered a \$24 million plus defamation judgment that was ultimately overturned on appeal.<sup>193</sup> Nevertheless, he felt that libel laws do not unduly affect news coverage.<sup>194</sup> Ross admits that he suffered many sleepless nights while the litigation was pending.<sup>195</sup> But he was lucky in that his employer continued to support him: he received a contract renewal as well as generous raises.<sup>196</sup> Today the judgment has little effect on his reporting.<sup>197</sup> He is less inclined to rely on confidential sources, but he still reports what he believes to be true.<sup>198</sup>

184. Hale Interview, *supra* note 170; Mitchell Interview, *supra* note 167.

185. Gelber Interview, *supra* note 166; Zucker Interview, *supra* note 168.

186. *Id.*

187. Gelber Interview, *supra* note 166.

188. *Id.*; Zucker Interview, *supra* note 168.

189. Gelber Interview, *supra* note 166.

190. Zucker Interview, *supra* note 168.

191. *Id.*

192. *Id.*

193. This is the Wayne Newtown case against NBC and Brian Ross. *Newton v. National Broadcasting, Inc.*, 930 F.2d 662 (9th Cir. 1990). Actual award in excess of \$19 million plus at least \$5 million in interest.

194. Telephone Interview with Brian Ross, Correspondent, NBC News (Oct. 9, 1992) [hereinafter Ross Interview].

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

Nevertheless, Ross worries that a more timid journalist might be affected by such an ordeal.<sup>199</sup>

Is there a Maxwell parallel in the United States—a particularly litigious individual who scares newspapers and stunts their coverage of him? The simple answer is no.<sup>200</sup> Some media reported that they receive threats designed to discourage them from airing allegations.<sup>201</sup> For example, CBS's *60 Minutes* is routinely threatened that it will be sued regarding stories that it plans to air.<sup>202</sup> But these threats do not have much effect on coverage.<sup>203</sup> In rare instances, editors will soften or alter stories to protect themselves, but they rarely kill a story.<sup>204</sup> Moreover, they do not seem to fear any particular individual like the British media feared Maxwell.<sup>205</sup>

During the course of the interviews, we payed particular attention to the major television networks. Those outside the networks warned us that reporters at the networks often complain about their pieces being "lawyered to death." The interviews revealed that, although the networks seem to be somewhat more concerned about defamation issues, defamation laws do not have a major impact on their coverage. Indeed, network sources did not seem unduly concerned about the possibility of defamation suits. This lack of concern stems from the fact that the networks are infrequently sued. For example, NBC may be threatened with suit as often as once a week,<sup>206</sup> but ninety percent of the complainants do not file suit.<sup>207</sup> One producer stated that, although he had been sued, he had never been to court.<sup>208</sup> The same is true at CBS, which indicated that defamation does not "come up all that much."<sup>209</sup> CBS gets a lot of angry letters and responses, but it is sued infrequently.<sup>210</sup>

The networks also indicated that they never "kill" a story because of defamation concerns.<sup>211</sup> They may rewrite a story, but they rarely

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199. *Id.*

200. Friedman Interview, *supra* note 167; Porges Interview, *supra* note 167.

201. Mitchell Interview, *supra* note 167.

202. Gelber Interview, *supra* note 166.

203. *Id.* Mitchell Interview, *supra* note 167. Again, the one major exception is provided by those who publish internationally. CNN will consider an individual's litigious nature in deciding what to publish. Weiss Interview, *supra* note 175.

204. *Id.*

205. *Id.*

206. Friedman Interview, *supra* note 167.

207. *Id.*

208. *Id.*

209. Porges Interview, *supra* note 167. CBS's house counsel disagreed. Zucker Interview, *supra* note 168.

210. *Id.*

211. Friedman Interview, *supra* note 167; Porges Interview, *supra* note 167.

make major changes.<sup>212</sup> Producer Stephen Friedman flatly stated that defamation law has very little effect on what he airs.<sup>213</sup> Indeed, he spends less than three hours a month doing prepublication review of broadcasts for defamatory material.<sup>214</sup> ABC claims that it will air allegations it believes to be true, even though it fears it may lose in court.<sup>215</sup> Discussions with correspondents seemed to confirm these statements.<sup>216</sup>

CBS's house counsel suggested that defamation laws do have a significant effect on reporting. He felt that the processes described above—of seeking additional sources and rewriting—have a significant chilling effect.<sup>217</sup> His major complaint was that defamation laws impose significant additional work on editors, producers, and lawyers.<sup>218</sup> Nevertheless, he felt that most pieces are approved without alteration and are not extensively edited or rewritten.<sup>219</sup> In the final analysis, CBS is still able to “put forth what needs to be put forth.”<sup>220</sup>

There are some significant differences between the national networks and other media outlets. The networks tend to air a number of investigative pieces which are more likely to contain defamatory material.

212. *Id.*

213. Friedman Interview, *supra* note 167; Telephone Interview with Stephen Friedman, Executive Producer, NBC Nightly News with Tom Brokaw (Sept. 29, 1992).

214. *Id.*

215. *Id.*

216. Even though we sought the names of reporters whose pieces had allegedly been lawyered to death, we were unable to find them. For example, we were urged to speak with Carl Stern of NBC News. But Stern did not complain about undue lawyering. On the contrary, he complained about irresponsible journalism. Telephone Interview with Carl Stern, NBC News (Oct. 2, 1992) [hereinafter Stern Interview]. He felt that the *New York Times* decision had been too effective and that journalists felt free to publish anything. As a further example, it was suggested that we talk to Brian Ross of NBC News, since he had been on the wrong side of a substantial defamation judgment that was ultimately overturned on appeal. But Ross did not complain about excessive lawyering either. Ross Interview, *supra* note 194.

Finally, we made contact with several news and libel defense organizations. For example, we talked to Jane Kirtley, Executive Director of The Reporters Committee for Freedom of the Press. Kirtley was recommended because The Reporters Committee operates a hotline and information clearinghouse for journalists, and it was felt she would be aware of any problems. But she indicated that she rarely received calls involving defamation issues or about pieces being “lawyered to death.” Telephone Interview with Jane E. Kirtley, Executive Director, The Reporters Committee for Freedom of the Press (Sept. 29, 1992) [hereinafter Kirtley Interview]. Discussions with Linda Friedman of the Libel Resource Defense Center produced a similar result. Telephone Interview with Linda Friedman, Libel Resource Defense Center (Oct. 9, 1992).

217. Zucker Interview, *supra* note 168.

218. *Id.*

219. *Id.*

220. *Id.*

These investigative pieces are scrutinized more carefully than other programs. Both ABC and NBC regularly engage in prepublication review of investigative pieces.<sup>221</sup> But even when network lawyers are concerned about an investigative piece, they rarely kill that piece,<sup>222</sup> although they might rewrite it to some extent, as suggested earlier. Moreover, they rarely make major changes if a reporter's claims are supportable.<sup>223</sup>

Even though few complained about pieces "being lawyered to death," many complained about journalists who felt they could publish anything. Stephen Friedman stated that some journalists believe they can air anything they want simply because they are journalists.<sup>224</sup> Carl Stern, a reporter for NBC News, agreed.<sup>225</sup>

U.S. journalists who publish and broadcast overseas seem to be somewhat more conservative than those who publish in the United States. This conservatism is understandable. CNN, for example, broadcasts around the world. To the extent that plaintiffs have a choice, they will sue CNN in a foreign country. As a result, if the absence of an actual malice standard has a "chilling" effect on journalism, one would suspect that overseas broadcasters might be "chilled" in some cases by the threat of an English defamation action.<sup>226</sup>

But the interviews revealed that, by and large, foreign laws do not unduly affect U.S. overseas coverage.<sup>227</sup> The *Washington Post* and *New York Times* indicated that they use almost the same procedures and criteria for overseas publications and broadcasts that they use for domestic ones.<sup>228</sup> In only rare instances do they soften a story for the overseas market.<sup>229</sup> Interestingly, neither organization was threatened by Robert Maxwell regarding their coverage of him,<sup>230</sup> and both treated him no differently than they treated anyone else.<sup>231</sup> CNN is a little more cautious about its coverage. Again, its primary concern is with journalistic accuracy and with "getting it right."<sup>232</sup> But, at the same time, because CNN broadcasts constantly to all parts of the globe, it is more cautious about the threat of defamation suits.<sup>233</sup> In addition, CNN is

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221. Friedman Interview, *supra* note 167; Porges Interview, *supra* note 167.

222. *Id.*

223. Porges Interview, *supra* note 167.

224. Friedman Interview, *supra* note 167

225. Stern Interview, *supra* note 216.

226. In this regard, it is interesting to note the refusal of a New York court to enforce a British libel judgment. See 13 J. Media L. 205 (1992).

227. Freeman Interview, *supra* note 172; Werner Interview, *supra* note 171.

228. *Id.*

229. Freeman Interview, *supra* note 172.

230. *Id.*; Werner Interview, *supra* note 171.

231. *Id.*

232. Weiss Interview, *supra* note 175.

233. *Id.*

much more likely to have lawyers routinely engage in prepublication review of its broadcasts.<sup>234</sup>

## V. CONCLUSION

The United States Supreme Court's decision in *New York Times v. Sullivan* is now nearly thirty years old. In that decision, the Court speculated about the impact of state defamation laws on editorial decision-making. In the process, the Court made sweeping statements about the need to protect free expression and about the need for "breathing space."<sup>235</sup> The Court also indicated that there must be protection for inevitable erroneous statements.<sup>236</sup> As a result, the Court articulated the actual malice standard.

In formulating the actual malice standard, the Court itself did not rely on detailed empirical studies demonstrating the impact of defamation laws. Instead the Court chose, as it often does, to speculate about the need for an actual malice standard. Whether the Court speculated correctly has been a matter of debate.

The British experience provides interesting insights into the impact of the absence of the actual malice standard. Interestingly enough, that contrast suggests that the Supreme Court's original conclusions regarding the need for an actual malice standard were essentially correct.<sup>237</sup> By contrast to the U.S. media, the British media is far more timid. British reporting seems to be "chilled" by prevailing defamation laws, and the British press does not appear to be as free and robust as the U.S. press. Correspondingly, the U.S. media seems to believe that it has more "breathing space" for errors as indicated by its operating procedures and its statements. U.S. editors seem more concerned about journalistic accuracy and integrity than they do about the threat of liability.

Should the United States Supreme Court provide additional protection to the media? Based on the interviews, it is difficult to argue that additional protection is necessary. The actual malice standard may have its drawbacks, but it does not impose an undue burden on the media. There is no evidence of a serious "chilling" effect. U.S. editors do

234. *Id.*

235. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 84 S. Ct. 710, 721 (1964).

236. *Id.*, 84 S. Ct. at 721.

237. Columnist Anthony Lewis agrees:

The stuff of governmental decisions cannot be subject to a legal test of truth in our constitutional system. One man's truth is not another's. That is the central meaning of the first amendment: the right to differ about political truth, the right to criticize those who govern us without being held to a standard of temperateness or truth.

Lewis, *supra* note 3, at 620.

consult defamation attorneys from time to time, and they do alter some articles to minimize the possibility of being sued. But this chilling effect is minimal and may in fact be healthy.