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Ronit Mandelbaum

Defamation and the Public Official: The Big Chill

The jury was sent out for the last time on February 18, 1985, never to reach a verdict on a case hailed by many as the libel trial of the century.[1] *Westmoreland v. CBS Inc.*[2] started with a bang and ended with a fizzle when General William C. Westmoreland withdrew his $120 million libel claim against CBS[3] for statements made in a CBS documentary entitled *The Uncounted Enemy: A Vietnam Deception.*[4] Although General Westmoreland's personal battle has ended,[5] the war on libel law continues to rage. While only the most prominent libel suits reach the headlines, the number of libel suits filed by obscure local officials as well as preeminent public leaders continues to mount.[6]

The purpose of this Note is to illustrate some of the failings of our current liability standard for libel and to suggest some alternatives. This Note will point out who the true victims of libel litigation are, and how they are hurt. The *Westmoreland* case is used as a touchstone to illustrate principles that apply to most libel cases involving public officials and media defendants. By compelling news organizations to justify their reporting and criticism of high government officials, the court, in

1. NEWSWEEK, Oct. 22, 1984, at 60; NEWSWEEK, Mar. 4, 1985, at 59.

2. 596 F. Supp. 1170 (S.D.N.Y. 1984).

3. General Westmoreland, without warning, withdrew his claim against CBS on February 18, 1985, abruptly ending the four month-old trial. LA. Times, Feb. 19, 1985, Part I, at 1, col. 3.

4. The CBS 90 minute documentary, aired on January 23, 1982, charged that there was "a conspiracy at the highest levels of American military intelligence" during the Vietnam War "to suppress and alter critical intelligence on the enemy . . . ." Plaintiff General William C. Westmoreland's Memorandum of Law in Opposition to Defendant CBS's Motion to Dismiss and for Summary Judgment at 5, Westmoreland v. CBS Inc., No. 82 Civ. 7913 (PNL) (S.D.N.Y. July 20, 1984).

5. In deciding to withdraw the case, Westmoreland settled for a joint statement released to the public, which said: "CBS respects Gen. Westmoreland's long and faithful service to his country and never intended to assert, and does not believe that Gen. Westmoreland was unpatriotic or disloyal in performing his duties *as he saw them.*" L.A. Times, Feb. 19, 1985, Part I, at 8, col. 1 (emphasis added). Essentially, CBS did not concede anything, because they never accused Westmoreland of acting with any animus or seditious intent; they merely charged him with "doctoring the books." NEWSWEEK, Oct. 22, 1984, at 60, 62.

6. L.A. Times, Feb. 20, 1985, Part I, at 12, col. 1.

effect, chills the right of those media agencies to cover the news.[7] The fear of an expensive, time-consuming, and potentially crippling lawsuit may deter newspeople from investigating a controversial topic. At stake is the public's well-defined, judicially recognized interest in both investigative reporting and television coverage.[8] The mere possibility of drawing this genre of case into court compromises that interest.

"This genre of case" does not refer to libel suits against media defendants generally, but specifically to libel suits filed by public officials against press agencies, contesting reports pertaining to that official in his official capacity. These official acts often involve a "political question."[9]

The subject of Westmoreland's case, the Vietnam War, falls within this category. As the first modern day war to receive full television coverage of its events, it was sardonically nicknamed the "living-room war."[10] Everything about the Vietnam War, from its inception through its tangled history, was shrouded in political debate. "The notion that a judge and jury can decide the 'truth' about any aspect of that war is grotesque. It is also dangerous. For how can you have open debate on issues of fundamental public policy if critics fear that their views will be re-examined in libel suits?"[11]

Since the Court in *New York Times Co. v. Sullivan*[12] drastically rewrote American defamation law, few defamation cases have received as much public notoriety. Several explanations for the notoriety of the *Westmoreland* case readily come to mind. The issue is one of national sensitivity, and the lawsuit threatened to reopen nearly-healed war wounds. In addition, the lawsuit challenged the standard set by the Supreme Court in *New York Times*[13], and threatened to reshape libel law. The case dramatized the tension between the first amendment

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

8. "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 (1931).

9. *See infra* text accompanying notes 64-90.

10. The phrase alludes to the fact that millions of Americans watched the drama of the Vietnam War unfold nightly on the television sets in their living rooms.

11. Lewis, *Libel and Politics*, L.A. Daily J., Aug. 26, 1983, at 4, col. 3, 5.

12. 376 U.S. 254 (1964). Until the *New York Times* case was decided, libel was strictly a state matter, and no damage award had ever been held unconstitutional. The effect of the *New York Times* case was to constitutionalize the law of defamation, and manifest judicial concern for "uninhibited, robust and wide-open" debate on public issues. *Id.* at 270. The standard that emerged from this case is best known as the "actual malice" standard, which requires a public official to prove that a statement was made with knowledge that it was false, or with reckless disregard as to its truth or falsity. *Id.* at 279-80.

13. *Id.* at 279-80.

right to a free press and an individual's right to be free from libelous defamations. Finally, the stakes were high. General Westmoreland sought $120 million in damages.[14]

The controversy behind Westmoreland's libel suit dates back to 1967, when the Central Intelligence Agency (CIA) claimed that communist forces in South Vietnam were almost double the strength estimated by the United States Military Assistance Command.[15] General Westmoreland, commander of the United States armed forces in Vietnam from 1964 to 1968, and other officials asserted that the CIA numbers were inaccurate because they included certain communist groups that had no "offensive military capability,"[16] and hence could not be classified as fighters.

The conflict over enemy numbers raised some fundamental questions. Was the United States' strategy of attrition based on inaccurate calculations and, therefore, doomed from the outset? Were Johnson administration pronouncements, that there was "light at the end of the tunnel" justified? If the CIA figures had been accepted, would support for the war effort have collapsed?

These and other sensitive and controversial questions were addressed in the CBS documentary, *The Uncounted Enemy: A Vietnam Deception*, which, Westmoreland contended, libelled him. The program maintained that a conspiracy in Westmoreland's command led to purposeful underestimation of enemy troop strength for political reasons during a crucial point in the war.[17]

In response to the program, General Westmoreland mustered troops hungry to wage a war against the media in general, and against CBS veteran journalist Mike Wallace and the program's producer, George Crile, in particular.[18] As a defense against Westmoreland's libel charges, CBS raised a shield of "truth."[19] CBS contended that the broadcast was true, that it was exhaustively researched, that the program was an absolutely privileged expression of opinion under the first amendment, and that there was no evidence of malice.[20]

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14. Memorandum in Support of Defendant CBS's Motion to Dismiss and for Summary Judgment at 1, Westmoreland v. CBS Inc., No. 82 Civ. 7913 (PNL) (S.D.N.Y. May 23, 1984).

15. U.S. NEWS & WORLD REP., Oct. 1, 1984, at 44.

16. *Id.*

17. *Id.*

18. *See* NEWSWEEK, Oct. 22, 1984, at 60.

19. Memorandum in Support of Defendant CBS's Motion To Dismiss and for Summary Judgment at 267, Westmoreland v. CBS Inc., No. 82 Civ. 7913 (PNL) (S.D.N.Y. May 23, 1984).

20. *Id.* at 259, 289.

I. STATE OF EXISTING LAW

A. THE *NEW YORK TIMES* CASE

The law of defamation, since its constitutionalization in *New York Times Co. v. Sullivan*,[21] has primarily focused on reconciling two interests: reputation, and freedom of speech and press. The prevailing issue in cases which pit these interests against each other is how to strike a balance between them and yet afford each interest its deserved protection.

In *New York Times*, an Alabama police commissioner claimed he was libelled by a paid newspaper advertisement which criticized him in his official capacity.[22] Under common law at that time, when a publication was "libelous per se,"[23] the defendant's sole defense was "truth."[24] "Truth" meant that all the allegations set forth in the advertisement were unimpeachably true. Because there were several minute errors[25] in the advertisement, the truth defense was impaled.

The Supreme Court, sensing the potential chilling effect that this rigid rule would have on government critics, carved out a stricter liability standard for public officials. This standard severely limits a state's ability to award damages in a libel action brought by a public official against critics of his official conduct.[26] Critics of government officials are thus afforded greater freedom to express their opinions because the new standard of liability requires a plaintiff to prove that defendant acted with "actual malice."[27] This landmark decision strikes a balance which protects free speech to the detriment of the reputation or privacy of a public official.

Pertinent to any discussion of the "actual malice" standard, and its effects on potential litigants, is the Supreme Court's rationale for limiting media liability regarding public officials. The Court neatly lays out its reasoning in the opinion.

The overriding concern pervading the Court's discussion is that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[28] The Court

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21. 376 U.S. 254 (1964).

22. *Id.* at 258.

23. "[A] publication is 'libelous per se' if the words 'tend to injure a person . . . in his reputation' or to 'bring [him] into public contempt.' " *Id.* at 267.

24. *Id.*

25. *Id.* at 258-59.

26. *Id.* at 283.

27. The term "actual malice" means defendant acted with knowledge that the statement was false, or with reckless disregard of its truth or falsity. *Id.* at 279-80.

28. *Id.* at 270.

conceded that erroneous statements are inevitable in free debate, but held that such statements must nevertheless be protected "if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[29] In other words, free debate ought to be encouraged. If an occasional inaccuracy incident to the discussion defeats this privilege of free debate by subjecting the speaker to liability, those inclined to debate will refrain from so doing for fear of an expensive libel suit.

The Court went on to chart the demise of the Sedition Act,[30] which was abolished because of its inconsistency with first amendment principles. The Sedition Act, which criminalized criticism of government, expired in 1801 and was never reinstated because it restrained debate about government activities.[31] The Court explained: "What a State may not constitutionally bring about by means of a criminal statute [*i.e.*, via the Sedition Act] is likewise beyond the reach of its civil law of libel."[32] Otherwise, the threat of a stiff civil damage award would be but a surrogate for a criminal penalty, and would similarly inhibit the controversial debate.[33] "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[34] And so, freedom of the press was reborn.

Another feature in the Court's rationale was a type of reciprocal privilege argument. An earlier case, *Barr v. Matteo*,[35] had established an absolute privilege for utterances made by a federal official if made within the "outer perimeters of his duties."[36] The reasons given for this official privilege were that the threat of liability would "inhibit the fearless, vigorous and effective administration of policies of government"[37] and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[38] Analogous considerations support the privilege for citizen-critics of government officials. It is as much a citizen's duty to criticize as it is an official's duty to administer.[39]

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29. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415 (1963)).
30. Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1801).
31. *New York Times*, 376 U.S. at 276-77, n.16.
32. *Id.* at 277 (footnote omitted).
33. *Id.*
34. *Id.* at 278.
35. 360 U.S. 564 (1959).
36. *Id.* at 575.
37. *Id.* at 571.
38. *Id.* (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
39. "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. . . . [T]hey knew that order cannot be secured merely through fear of punishment for its in-

There are two other reasons for increasing a public official plaintiff's burden of proof. First, public officials have media access and can respond to potentially defamatory statements made by the press.[40] A public official is unlike an obscure individual whose reputation is suddenly maligned in a public communication, and who has no means of vindicating himself other than in a court of law. The public official, having ready media access through press conferences and press releases, is not without means to clear up a controversy.

A closely related reason is that once an individual is elected or appointed to a public office, she thereby assumes the risk of public exposure.[41] The very term "public official" implies that the official is in the public eye and acts on behalf of the public and, therefore, any publicity she receives, whether positive or negative, is reasonably foreseeable.

B. *NEW YORK TIMES* AND *WESTMORELAND*

The fact that a public official has relatively easy access to the media injects political and judicial discomfort into cases such as *Westmoreland*. On the one hand, "the effective functioning of a free government like ours depends largely on the force of an informed public opinion."[42] The media presumably performs this information-giving function. On the other hand, an individual's interest in the integrity of his reputation countervails the public's interest in the free flow of information. In *New York Times*, the Court resolved this conflict in favor of a freer press, with one important restriction: the actual malice limitation. The Court has remained unwaveringly true to its original holding, conceding that "as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."[43]

A public official, as aforementioned, assumes the risk of potentially defamatory statements concerning his behavior in any position of public charge.[44] The thrust of the *New York Times* rationale is that a right to the integrity of a public official's reputation is generally subordinate to the greater public good gleaned from debate on controversial topics of

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fraction; 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 . . . ." Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring), *overruled, Brandenburg v. Ohio*, 395 U.S. 444 (1969).

40. *New York Times*, 376 U.S. at 304-05.

41. *Id.* at 291-92.

42. Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring).

43. *Id.* at 576.

44. *Id.* at 577.

which the public official is a part. When *New York Times* was decided, it was hailed by champions of first amendment freedoms as "an occasion for dancing in the street."[45] Unfortunately, cases such as *Westmoreland* force the media to dance to a slightly different tune. For nearly twenty years, no court has permitted any high-ranking federal official to recover damages for criticism of actions taken in her official capacity. Although *New York Times* allows recovery for libel upon proof of actual malice, "no case before or since has involved an action by a federal official at [Westmoreland's] level suing for criticism of his official conduct."[46]

A rule barring recoveries by high-ranking public officials for criticism of their actions in their official capacities would not conflict with the *New York Times* decision. In fact, the *New York Times* Court itself implied a similar idea in its discussion of the Sedition Act. Although the Sedition Act expired, and thus was never tested in the courts, "the attack on its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional."[47] The Sedition Act was found unconstitutional even though it punished only criticisms that were both false and made with defamatory intent.[48] Furthermore, there was "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[49] In essence, Westmoreland, as the most influential commanding officer in the Vietnam War, was an agent of the government; thus, criticism of him is tantamount to criticism of the government, explicitly barred as an action for seditious libel.[50]

In a broader sense, Westmoreland's case appeared more like an instrument in a political struggle, similar to Commissioner Sullivan's vain attempt to pressure the media into discontinuing coverage of the racial confrontation in the South, than a pure effort to restore a tarnished

45. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125 (quoting A. Meiklejohn).

46. Memorandum in Support of Defendant CBS's Motion to Dismiss and for Summary Judgment at 245, Westmoreland v. CBS Inc., No. 82 Civ. 7913 (PNL) (S.D.N.Y. May 23, 1984).

47. *New York Times*, 376 U.S. at 276.

48. *Id.* at 298 n.1 (Goldberg, J., concurring in result).

49. *Id.* at 276.

50. "In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily 'of and concerning' the governors and any statement critical of the governors' official conduct is necessarily 'of and concerning' the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution." *Id.* at 299 (Goldberg, J., concurring in result).

reputation. At stake in the *New York Times* case was "more than the fate of one newspaper. It was the ability, or the willingness, of the American press to go on covering the racial conflict in the South as it had been doing."[51] At stake in cases like *Westmoreland* is the willingness of media organizations, large and small, to risk coverage of controversial issues for fear that the "ultimate truth" of their reports will be subject to the wile and whimsy of a jury.[52]

Westmoreland's case was championed by the Capital Legal Foundation, a public interest law firm with neo-conservative financial backers, among them Richard Mellon Scaife, the Fluor Foundation, and the Smith Richardson Foundation.[53] Westmoreland's lawyer, Dan M. Burt, publicly announced that the country was about to witness the "dismantling of a major news network."[54] Westmoreland used the court as a vehicle in his struggle to vindicate the military's conduct in the War, conduct which was strongly questioned in the CBS broadcast. It seems clear that a court of law is a dubious forum for a political debate on the Vietnam War. Still, it appears plausible that Westmoreland dressed up a bona fide political controversy in the trappings of a libel suit. The question remains whether this tactic should be tolerated, and if not, what is the alternative?

Judicial recognition of the problems and potential errors that inhere in leaving difficult questions, such as Westmoreland's subjective knowledge at the time of the reports, to a jury manifests itself in the seminal *New York Times* case. There, the Court, after taking pains to justify the application of its "actual malice" test, went on to usurp the trial court's function upon remand by applying the test to the facts of the case.[55] Thus, the Court's own trepidation of an "incorrect" verdict, if the ultimate decision was left to the jury, evidenced itself early on.

C. TRIAL COURTS HAVE TROUBLE APPLYING THE *NEW YORK TIMES* TEST

Figures compiled by the Libel Defense Resource Center (LDRC)

51. Lewis, *The Central Meaning of the First Amendment*, 83 COLUM. L. REV. 603, 605 (1983).

52. *See* Time Inc. v. Pape, 401 U.S. 279, 290 (1971) (" '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.' " (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)); Time Inc. v. Hill, 385 U.S. 374, 389 (1967) ("fear of the expense involved in . . . defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone' ") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

53. Bruck, *The Mea Culpa Defense*, AM. LAW., Sept. 1983, at 82.

54. Lewis, *supra* note 11.

55. *New York Times*, 376 U.S. at 284-86.

support the Supreme Court's implicit fear of jury verdicts. Of cases that actually reach the jury, LDRC figures report that eighty-nine percent are decided against defendants.[56] On appeal, however, nearly seventy-five percent of these verdicts are reduced or reversed, as opposed to a mere nineteen percent reversal rate of all civil cases generally.[57] These figures demonstrate that media defendants may ultimately be unfettered by limits on their first amendment rights. The prohibitive costs of an ultimately unsuccessful lawsuit (in terms of attorney fees, valuable man-hours spent by editors and reporters during discovery, and the actual litigation), however, limits the broad freedom bestowed by the Supreme Court in *New York Times*.

A particularly extreme example of a trial court's ineptitude in applying the actual malice test illustrates that the fear of incorrect verdicts is not without merit. In *Bose Corp. v. Consumers Union of United States Inc.*,[58] the issue was whether a publication could be held liable for saying in a review that the sound of the stereo system "tended to wander about the room," rather than saying that the sound tended to move "along the wall."[59] The district court which found that the manufacturer was a public figure, concluded that by using the words "about the room" to describe a sensory perception, defendant had done so with "actual malice," and had falsely reported about the stereo system.[60]

The First Circuit reversed, stating its obligation to "perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law. . . ."[61] The Supreme Court affirmed, noting the importance of independent appellate scrutiny as expressed in *New York Times*. "The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law . . . [which] reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."[62]

Thus, while judgment was ultimately rendered in favor of defendants, they nonetheless had to endure the time and expense of litigating the case. Because civil litigation costs are universally high, and lenient discovery rules compound the cost, these facts alone may be unpersuasive reasons to alter our libel system or to provide additional protection

56. Libel Defense Resources Center, Summary Judgment in Libel Litigation: Assessing the Impact of *Hutchinson v. Proxmire* (Oct. 15, 1982) [hereinafter cited as LDRC].

57. *Id.*

58. 466 U.S. 485 (1984).

59. *Id.* at 490.

60. *Id.* at 490-91.

61. 692 F.2d 189, 195 (1st Cir. 1982).

62. 466 U.S. 485.

for defendants. When these facts are coupled with the extraordinary reversal rate of cases that go up on appeal,[63] however, the argument for a more efficient, less prohibitive scheme, is more compelling. Furthermore, the ready access to the media, and thereby to the public, enjoyed by high-ranking federal officials such as Westmoreland, also militates in favor of barring suits against media defendants for criticism of these government officials acting in their official capacity.[64]

III. THE POLITICAL QUESTION DOCTRINE

A. DEFINITION

The *Westmoreland* case, enshrouded in questions of military and political significance, lends itself to an analogy with the "political question doctrine"[65] of constitutional law. Roughly speaking, the political question doctrine maintains that certain matters, which are in essence "political," are best left to the people in their sovereign capacity, rather than subject to judicial review.[66] The mere fact that a question relates to politics does not render it non-justiciable as a political question case. In determining whether a question is political, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."[67] The consequence of a determination that an issue is a political question is the absolute non-justiciability of that issue.

B. *WESTMORELAND* AND THE POLITICAL QUESTION DOCTRINE

A libel case necessarily requires a factual determination that the wrongdoer spoke falsely of the plaintiff. Under the *New York Times* actual malice standard, a plaintiff's prima facie case depends upon the falsity of the statement made because truth is an absolute defense. Therefore, the basic presumption underlying all libel actions is that the truth or falsity of the allegedly libelous statement is ascertainable. This presumption inextricably binds the defamation cause of action to the political question doctrine. One of two ideas inheres in the classification

63. LDRC, *supra* note 56.

64. Admittedly, a problem arises in the case of lesser government officials. They arguably deserve more lenient treatment, because they cannot be said to have media access equivalent to that available to higher-ranking officials.

65. "The political question doctrine—which holds that certain matters are really political in nature and best resolved by the body politic rather than suitable for judicial review—is a misnomer. It should more properly be called the doctrine of nonjusticiability, that is, a holding that the subject matter is inappropriate for judicial consideration." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 109 (2d ed. 1983).

66. *Id.*

67. Coleman v. Miller, 307 U.S. 433, 454-55 (1939) (footnote omitted).

of an issue as a political question: either the issue is too momentous, which "tends to unbalance judicial judgment,"[68] or the issue is one which remains intractible in the face of any form of established law.[69] In other words, non-justiciability due to the political nature of an issue results from the court's inability to gather or be presented with all the relevant facts, or from the inability to apply compatible legal standards.[70] Therefore, a determination of non-justiciability is necessarily determinative of the factual issue of truth or falsity.

Examples of questions considered political are the legality of the Vietnam War,[71] and constitutional amendment ratification.[72] The common thread of most political question cases is a failure to meet the general criteria enunciated in *Baker v. Carr*.[73] That Court held that a case determined to involve a political question must demonstrate a:

> constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government . . . or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[74]

Where one of these criteria is functionally inextricable from the case, a court may dismiss it on grounds of non-justiciability.

Theoretically, we could have a system whereby every "legal" question arising from the core of government would be decided by courts. Such a system, however, would clearly over burden courts, thereby impeding government functions. Moreover, "it is not the system ordained and established in our Constitution."[75] Courts have established varying approaches to the political question issue. For example, the district court in *Atlee v. Laird*[76] considered the following relevant factors: whether potentially relevant information is (1) by its bulk, unmanageable for the court; (2) might not be assembled; or (3) possibly devoid of

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68. A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962).

69. *Id.*

70. The separation of powers doctrine also precludes justiciability of certain issues.

71. Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd summarily sub. nom.* Atlee v. Richardson, 411 U.S. 911 (1973).

72. Coleman v. Miller, 307 U.S. 433 (1939). "[T]he question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Id.* at 450.

73. 369 U.S. 186 (1962).

74. *Id.* at 217.

75. Sierra Club v. Morton, 405 U.S. 727, 754 (1972) (Douglas, J., dissenting (Appendix)).

76. 347 F. Supp. 689 (E.D. Pa. 1972).

standards that the court could apply to reach a judgment on the merits.[77]

Academicians too have laid out several theories and purposes of the political question doctrine. A particularly useful one is Professor Scharpf's functional approach to the political question doctrine,[78] which views the doctrine as a means to accommodate situations in which there is: (1) difficulty of access to information; (2) need for uniformity in decisions; and (3) deference to the wider responsibility of the political departments.[79] The issue in *Westmoreland*, as in cases of its genre which involve national political issues and ideas, conforms with the political question doctrine in terms of the first criterion: difficulty of access to information.

Admittedly, the difficulty of access to information criterion has been applied mainly to foreign relations cases where the Court sensed its own incapacity to adjudicate matters that necessarily involved fact finding abroad.[80] Without these facts, the Court could not be assured of a full presentation of all relevant and legal questions. The information problem reconciles those cases wherein the Court demurred from reaching any decision when the case involved the validity of a treaty,[81] or territorial boundaries of foreign states.[82] In those cases, the Court acknowledged that its own information gathering ability was inferior to that of the executive branch.[83] Consequently, it would be inequitable to accept information given by the State Department as true, when the executive or his representative was a party to the suit.

The case for basing the political question doctrine on an information problem is somewhat weaker in the case of a purely domestic issue, but "the rationale of inadequate information has obtained some significance in decisions concerning the ratification of constitutional amendments, legislative enactments and the duration of the Civil War."[84] *Westmoreland*, although in many ways a "domestic" case, involved information problems no less complex and evanescent than those dubbed "foreign."

The information problem is one that plagues every case: the bigger the case, the more information that need be collected and processed. What differentiates the *Westmoreland*-type of case from any other

77. *Id.* at 702-03.

78. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

79. *Id.* at 566-83.

80. *Id.* at 567.

81. *E.g.*, Doe v. Braden, 57 U.S. (16 How.) 635 (1853).

82. *E.g.*, Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839).

83. Scharpf, *supra* note 80, at 567.

84. *Id.* at 568-69.

large scale litigation is the end result. Our judicial system is designed to leave questions of fact to a jury, that is expected to discern which "facts" are "true." Those facts are then subject to the application of the relevant law, and the judge hands down the decision. Only, in the *Westmoreland* case, there were no "facts."[85]

To recapitulate, a libel plaintiff must shoulder the burden of proving that defendant acted with malice (i.e., with intentional or reckless disregard of the truth or falsity of his statement). A defendant's absolute defense is truth. To be able to argue the truth or falsity of an issue implies that there is a truth or falsity to be discovered, and if there is a truth determination to be made, we charge the jury with discerning it.

The *Westmoreland* case, stripped of its libel trappings, boils down to a question of numbers: numbers which, unfortunately, are unverifiable. These numbers are of enemy troop strength, which CBS contended were under estimated, and which Westmoreland contended represented the "true" numbers. The reason that these presumably hard, fast numbers dissolved into fugitive non-facts, which led to non-justiciability, is that they were but estimations (i.e., estimations based on facts capable of varying interpretation). Although the issue remains unresolved, the "numbers" were a hotly a debated issue throughout the War, and have rightly been the topic of many books on the subject.[86] The ninety minute CBS broadcast proceeded on the theory that the CIA figures were more accurate, and thus implied that Westmoreland's "low" estimation helped misguide President Johnson into believing that the United States was gaining on its war of attrition. How could this issue be resolved in light of the fact that certain army officials and CIA officers had bona fide academic arguments regarding the means of estimating enemy troop strength? What can a court of law possibly hope to establish; that one estimate was right and the other estimate was wrong? Essentially, both approximations were expressions of professional opinions.

In its simplest terms, the case countered CBS' acceptance of the CIA numbers (the CIA determined enemy troop strength to be 595,000) against Westmoreland's numbers (328,000),[87] and would have asked a jury of lay persons to decide which figures, or interpretation thereof, to believe. This jury determination would have been made after years of scholarly effort had failed to resolve the issue. Not only is such a re-

85. *See infra* note 88 and accompanying text.

86. *E.g.*, R. BETTS, SOLDIERS, STATESMEN, AND COLD WAR CRISES (1977); P. MCGARVEY, THE MYTH AND THE MADNESS (1972); T. POWERS, THE MAN WHO KEPT THE SECRETS: RICHARD HELMS AND THE CIA (1979).

87. These are maximum estimates as of March 31, 1968. U.S. NEWS & WORLD REP., Classified National Security Study Memorandum 1 (1969), *reprinted in* Rust, *Westmoreland v. CBS*, L.A. Daily J., Oct. 4, 1984 at 4, col. 3.

sponsibility too great to place on a jury, but neither would the "result" befit a libel trial.

Undeniably, the scope of the actual political question doctrine is very narrow. Although lack of access to relevant information may result in a failure to assure correct determination of particular issues, the political question doctrine probably could not be used in traditional libel cases because courts have blunted the force of the doctrine with a "normative qualification."[88] The doctrine is not applied where important individual rights are at stake. In those cases, the Court's unwillingness to "abdicate responsibility"[89] for ultimately striking the balance between individual rights and military or political interests overrides the political question doctrine.

The foregoing political question analysis aimed to highlight the major issue in the *Westmoreland* case in light of its unsuitability for courtroom debate. Issues that have been deemed political questions have been barred from courtrooms for much the same reasons; namely, difficulty of access to pertinent information makes the decision-making burden too onerous.

IV. FORCE OF SELF-CENSORSHIP

A. EDITORIAL PRIVILEGE

The Constitution clearly does not allow punishment for expression of opinions: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[90] One foundation of first amendment ideology rests on this "marketplace of ideas" notion, which assumes that the average man, when exposed to an unfiltered spectrum of ideas, has the ability to distinguish which ideas are "good" from those which are "bad."[91]

False facts, however, are less deserving of protection because they have no intrinsic value.[92] Therefore, our law protects false facts only to the extent (that judges believe) they promote vigorous debate (i.e., until the point that they are uttered with actual malice). Actual malice, by definition, is a subjective standard, which creates the often insuperable problem of deciding what a defendant actually thought or believed. In

88. Scharpf, *supra* note 80, at 584.

89. *Id.*

90. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (footnote omitted).

91. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

92. St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

print or broadcast media cases, determining what an author or broadcaster truly believed often entails intrusion upon sensitive areas of the "editorial process" or "reporter privilege."[93]

In *Herbert v. Lando*,[94] the Court confronted this problem when Colonel Herbert claimed that CBS libelled him in a television broadcast. In an effort to prove his case, Herbert sought to compel network employees to answer various questions. The employees had refused to answer "on the ground that the first amendment protected against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process."[95] The majority firmly rejected CBS' claim that an "editorial privilege" shields from discovery information which would reveal editorial processes. Since that case was decided in 1979, libel plaintiffs have had broad leeway to requisition a reporter's notes and preliminary drafts, including edited segments that, in the editor's opinion, were best left on the cutting room floor.

Justice Brennan, in his partial dissent in *Herbert v. Lando*, foresaw that "disclosure of the editorial process of the press will increase the likelihood of large damages judgments in libel actions, and will thereby discourage participants in that editorial process."[96] Justice Brennan warned that the editorial processes may be inhibited in other ways as well:

> For example, public figures might bring harassment suits against the media in order to use discovery to uncover aspects of the editorial process which, if publicly revealed, would prove embarrassing to the press. In different contexts other First Amendment values might be affected. If sued by a powerful political figure, for example, journalists might fear reprisals for information disclosed during discovery. Such a chilling effect might particularly impact on the press' ability to perform its "checking" function.[97]

Justice Brennan suggested that media defendants be afforded a partial "editorial privilege," defeasible upon a prima facie showing by the public official plaintiff of defamatory falsehood.[98] Justice Brennan analogized this type of evidentiary privilege to the executive privilege,

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93. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring in result) ("[T]he real issue . . . is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by . . . allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind.").

94. 441 U.S. 153 (1979).

95. *Id.* at 157 (footnote omitted).

96. *Id.* at 191 (Brennan, J., dissenting in part) (footnote omitted).

97. *Id.* at n.11 (citation omitted).

98. If "a public-figure plaintiff is able to establish, to the prima facie satisfaction of a trial judge, that the publication at issue constitutes defamatory falsehood, the claim of damaged reputation becomes specific and demonstrable, and the editorial privilege must yield." *Id.* at 197 (footnotes omitted). *See also id.* at 198 n.17.

the rationale of which is explained in *United States v. Nixon*.[99] "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[100] Similarly, the likelihood of a future libel judgment will "dampen full and candid discussion among editors of proposed publications. Just as impaired communication 'clearly' affects 'the quality' of executive decision making . . . so too muted discussion during the editorial process will affect the quality of resulting publications."[101]

A grand paradox emerges from this reasoning. To ensure more accurate press coverage of public events, we must protect the editorial process from forced disclosure. Yet, to ensure a more responsible press (in terms of accountability), granting such an editorial privilege makes the actual malice standard, by which the press is bound, nearly impossible to apply. Nonetheless, the same paradox thrives in the judicially recognized executive privilege.[102]

Ultimately, the paradox requires a type of judicial balancing which, in many ways, is no less abstruse than the first amendment versus personal reputation dichotomy. Editorial privilege, according to Justice Brennan, requires a case by case determination to accomodate the unique exigencies of each case.[103] Justice Brennan's partial privilege is less radical than Justices Stewart's and Marshall's advocacy of a total privilege, which would render the *New York Times* standard toothless. Under a total privilege rule, plaintiffs would still be able to recover if statements are made with reckless disregard. In most cases, however, plaintiffs would be deprived of the means to discover defendants' subjective beliefs. A partial editorial privilege rule is a better alternative than the current *Herbert v. Lando* rule, which may be abused as previously discussed.[104]

A partial editorial privilege rule would check roving discovery and place a greater, albeit necessary, burden on the trial judge. The trial judge would be required to examine carefully plaintiff's original complaint to determine whether the prima facie case has been established before sanctioning (potentially unruly) discovery exercises. Pretrial disclosure supervised by the trial judge protects "the press from unnecessarily protracted or tangential inquiry."[105] The belief that edited

99. 418 U.S. 683 (1974).

100. *Id.* at 705 (footnote omitted).

101. Herbert v. Lando, 441 U.S. 153, 194 (1979) (Brennan, J., dissenting in part) (citation omitted).

102. *Nixon*, 418 U.S. at 711-12.

103. *Herbert*, 441 U.S. at 197 (Brennan, J., dissenting in part).

104. *See supra* text accompanying notes 98-103.

105. *Herbert*, 441 U.S. at 206 (Marshall, J., dissenting).

portions and unaired segments of any show are the inevitable result of any type of "editorial process" argues in favor of a partial editorial privilege rule.

Westmoreland argued that the failure to present *The Uncounted Enemy* as an editorial divested the program of the immunity that our law provides to statements of opinion. This argument is tenuous at best. If Mike Wallace prefaced each accusation with a perfunctory "we at CBS believe . . .," matters would not have been qualitatively different. All broadcasts are inevitably products of various editorial judgments and present some type of bias. The first amendment grants "breathing space" to these editorial decisions.[106]

B. LITIGATION COSTS

Broadcast journalism occupies a unique position in our society because of the anomalous practice of licensing broadcasters and imposing the "fairness doctrine."[107] This same notion of "fairness" may fuel many libel decisions. The media's alleged power may unfairly jeopardize a man's reputation. In reality, however, the disparity between media power and a public official's ability to generate media coverage is not very large. For example, Westmoreland received publicity from the moment the program was aired. His various channels of publicity included TV Guide, television and radio broadcasts, and newspapers. "He succeeded to the point that the public may well have thought better of him after than it did before the documentary. He did not need a legal forum. He used the marketplace, and that is where the debate belongs."[108] The actual verdict, should there have been one, would have been almost inconsequential.

A recent example of a similar case is *Sharon v. Time, Inc.*[109] Former Israeli defense minister Sharon admitted that his goal in litigating his libel case was to prove a Time Magazine statement wrong.[110] Sharon achieved a Pyrrhic victory when the jury found Time's statement false. Although the statement was technically incorrect, the verdict made it clear that Time did not act with the requisite "actual malice," therefore, no libel.[111] On the other hand, the technical victory

106. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

107. This doctrine imposes affirmative responsibilities on a broadcaster to provide coverage of issues of public importance which adequately and fairly reflects different viewpoints. CBS Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Major advocates of both sides of political and public issues should be given fair and equal opportunity to broadcast their viewpoints. 47 U.S.C. § 315 (1982).

108. *Lewis, supra* note 51, at 622.

109. 599 F. Supp. 538 (S.D.N.Y. 1984).

110. NEWSWEEK, Jan. 28, 1985, at 46.

111. Sharon v. Time, Inc., No. 83 Civ. 4660 (S.D.N.Y. Jan. 31, 1985).

for Time was hollowed by exorbitant attorneys' fees, by time lost from journalistic endeavors, and by jeopardizing Time's reputation. All those costs, however, fade against the most deleterious effect of expensive litigation: the inevitable chilling of media willingness to cover controversial events.[112] Thus, by litigating the case, Sharon circumvented the protection set up for the media by the "actual malice" test (a burden of proof Sharon failed to sustain).

Proponents of stricter limitations on media freedom argue that high litigation costs will ensure media accountability by curbing careless reporting, and perhaps will encourage more thorough corroboration of stories or news scoops.[113] While this may be an admirable journalistic goal, many years of court decisions support the current sanctification of first amendment freedoms. Media accountability should not be achieved by paving inroads through first amendment rights. Currently, common law concerning libel is not designed to punish mere careless or negligent reporting. The bastion of *New York Times* affords the media greater liberty by requiring proof of a reckless disregard for the truth or falsity of the statement in question. For all the aforementioned reasons, the media is granted great flexibility that is not easily defeated by an occasional error.

Furthermore, even if we want to require greater accountability or precaution, it is a perversion to use the court system as a vehicle for punishing otherwise "innocent" defendants. Litigation means little when the plaintiff "wins" even if he loses. Although a lawsuit against an organization with the size and strength of CBS or Time Magazine may not evoke sympathy, the effect of similar litigation on other media defendants without deep pockets may be fatal.[114]

The fact that a newspaper or broadcasting network has the ability to absorb the costs of defending libel suits is irrelevant. Media have "virtually no economic incentive to publish anything that might lead to a libel suit."[115] In our system of television broadcasting, which is largely ratings determinative, "broadcasters gain or lose their audiences for reasons that are unrelated to the boldness or timidity of their journalism."[116] With the advent of television news chit-chat among the anchors, broadcast management seems more concerned with the aesthetics and conviviality of their programs than the aggressiveness of

112. *See supra* note 52 and accompanying text.

113. Dan Burt, Westmoreland's lawyer, was quoted as saying, "The issue . . . is whether the biggest media organization in the world is held accountable for what it says and what it does." Hager & Rosenstial, *Libel Battle: From Courts to Lawbooks*, L.A. Times, Feb. 20, 1985, at 1, col 1, at 12, col. 4.

114. *Id.* at 1, col. 1.

115. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 433 (1975).

116. *Id.*

their journalism.[117] Where libel suits provide an economic disincentive for robust, vigorous coverage of controversial issues, with potential legal ramifications, and where there is no corresponding incentive to "take a chance" on potentially libelous material, the media will present safe, conciliatory stories instead of cold, hard, investigative reporting. Free expression treads on precarious ground if it must depend on the media to subordinate economic self-interest to abstract first amendment ideas.[118] The only way to foster a marketplace of ideas and enhance discussion of public affairs is to "reduce the economic pressures that constrict it, even though that may increase the wealth and power" of the media.[119]

Prohibitively high litigation costs have the effect of punishing free expression in defiance of constitutional freedoms. The purpose of the *New York Times* standard was to protect the public from the deleterious effects of media self-censorship.[120] The rule fails, however, because it is ineffective in reducing the cost of defending against libel claims. The enormity of the financial burden undercuts the privilege. The *New York Times* privilege does not prevent self-censorship, because while it may ultimately protect the media from liability, it does not shield the media from the threat of the costly litigation required to invoke that protection. This tends to chill aggressive reporting, because it protects only *a posteriori*.

As discussed, the danger of cases such as *Westmoreland* lies in its prospective chilling effect. A different, albeit equally serious, method of intimidating the press into silence is well illustrated by the suit brought by Senator Paul Laxalt against the Sacramento Bee.[121] The Bee printed a story alleging illegal "skimming" (concealing taxable gambling revenue) in 1971 at a casino owned by Laxalt. CBS and ABC television postponed broadcasts of news on the subject after being contacted by Laxalt and his attorney. When questioned, the network executives refuted suggestions that they had been pressured into delaying their reports. Bee attorneys contended otherwise, and have since filed a countersuit accusing Laxalt of using the libel suit " 'to intimidate other newspapers, magazines and broadcast organizations and to deter them from pursuing the story.' "[122] The libel suit is thus a strong weapon in the hands of a public official with a facially sufficient complaint.

The greatest danger clearly lies with small news organizations for whom sky-rocketing libel insurance rates and escalating libel litigation

117. *Id.*
118. *Id.* at 434.
119. *Id.*
120. New York Times Co. v. Sullivan 376 U.S. 254, 279 (1964).
121. Laxalt v. Sacramento Bee, L.A. Times, Feb. 20, 1985 at 12, col. 3.
122. *Id.* at 12, col. 4 (quoting an unidentified editor).

costs are overly burdensome.[123] These smaller establishments will be forced to surrender their sentinels as publicly appointed watchdogs of government affairs. The president of a family-run publishing company in Chester County, Pennsylvania, maintains that as a result of nine libel suits in nine years, he has " 'eliminated investigative work at my newspapers' " and stays " 'away from stories that are controversial. My papers are now bland.' "[124]

The media serves a vital function in our society, and our Constitution contemplated a freedom for the media, defeasible only by the most egregious of wrongs. The Court in *New York Times* took the first courageous step towards unshackling the media. The increasing costs and incidence of libel litigation, however, serve as surrogate fetters. While the argument for abandoning a public official's right to sue for defamation remains compelling, several other less severe alternatives would mitigate the harshness of our current libel system.

V. SOME ALTERNATIVES

A. ALLOW ONLY ACTUAL DAMAGES

One theory of reform provides that no punitive damages may be awarded.[125] Under this theory, public official plaintiffs are required to prove actual malice to receive a favorable verdict of libel, and damages are restricted to compensation for actual injury. Injury, therefore, is no longer presumed from the fact of publication. The rationale for barring punitive damages is that the goal of the libel system is to make the plaintiff whole by restoring dignity to a damaged reputation and not by punishing the media.

Historically, the common law had a system of presumed damages; it was presumed that a person's reputation was necessarily injured by a false accusation. It was further assumed that damages had a miraculous rejuvenating power. If a jury verdict were not enough to restore a damaged reputation, then money must certainly heal a "bleeding character."[126] Common law courts awarded general damages in libel cases to avoid the tangle of evidentiary and administrative problems inherent in proving special damages. Justice Powell, writing for the majority in *Gertz v. Robert Welch, Inc.*, described the common law of defamation as an "oddity of tort law, for it allows recovery of puportedly compensatory damages without evidence of actual loss."[127] The majority went on

123. *Id.* at 12, col. 2.

124. *Id.* at 12, col. 3 (quoting Irvin Lieberman).

125. *See, e.g.*, Lewis, *supra* note 51, at 616.

126. Courtney, *Absurdities of the Law of Slander and Libel*, 36 AM. L. REV. 522, 557-59 (1902).

127. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

to hold that neither presumed nor punitive damages were recoverable absent a showing of actual malice.[128]

In the case of public official plaintiffs, the specter of presumed and punitive damages looms large because a showing of actual malice is required. Under current law, two types of damages are recoverable for libel of a public official: compensatory damages; and punitive (exemplary) damages. In the wake of *Gertz*, some state courts have reevaluated their rules on damages. The court in *Stone v. Essex County Newspapers, Inc.*[129] found *Gertz* to provide inadequate protection for first amendment rights, and consequently disallowed punitive damages in any defamation action. "[T]he possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship."[130] This language reflects Justice Powell's rationale in limiting the use of punitive damages to cases where actual injury is proved. "[J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . . ."[131]

Justice Powell saw punitive damages not as compensation for injury, but as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[132] This, according to Justice Powell, is impermissible. Nonetheless, even under *Gertz*, juries have broad discretion under the rubric of "actual damages" to award substantial damages, even in the absence of actual malice.

B. More Active Judicial Management

Anthony Lewis notes: "Experience has shown that the protective benefits of the *Sullivan* rule may be mythical if juries are given unregulated discretion."[133] If judges take a more active role in the initial determination of the validity of the claim, many harassing, costly suits could be avoided. Federal Rule of Civil Procedure 56(c) allows summary judgment in all civil cases where there is no disputed material issue of fact. "But the Supreme Court could properly, and meaningfully, remind trial judges of the particular need to dispose of cases promptly when the very existence of prolonged litigation threatens first amendment values."[134]

Furthermore, trial judges should adopt a narrow interpretation of

128. *Id.*
129. 367 Mass. 849, 330 N.E.2d 161 (1975), *cert. denied*, 462 U.S. 1111 (1983).
130. *Id.* at 860, 330 N.E.2d at 769.
131. *Gertz*, 418 U.S. at 350.
132. *Id.*
133. Lewis, *supra* note 51, at 617.
134. *Id.* at 618.

what constitutes a "fact" that is subject to trial, and should determine at the outset whether a particular statement is fact or protected opinion. A statement that cannot be proven false beyond a reasonable doubt should be considered a protected opinion. This would promote punishment of misreporting of facts, rather than punishment of biased or unfair reporting.

By requiring trial judges to take a more active role in examining the complaint *a priori* and weeding out frivolous claims, many unnecessary costs may be avoided. Guidelines should be set so that bona fide claimants will have their day in court. When a reputation has been allegedly blemished by a broadcast, and the trial judge determines on preliminary scrutiny that no actual malice inheres, recourse should be sought in the public forum. A public official has media access with or without a trial pending, and should fight speech with speech. Public officials can answer their critics through interviews, news conferences, and letters to the editor. We should encourage utilization of the public forum, the proverbial marketplace for society's ideas, for vindication of a public official's damaged reputation.

Admittedly, the theory is easier to discuss than to implement because of the tenuous semantic and subjective differences between fact and opinion. The point is that trial judges should be made cognizant that our constitutional values place a premium on differing opinions (i.e., robust, open debate) even at the expense of someone's reputation.[135]

C. Loser Pays Winner's Attorneys' Fees

Although this rule is used infrequently, making losers liable for all attorneys' fees would have the effect of preventing harassing libel suits. Unfortunately, this rule may also stifle some potentially meritorious suits by making the price of failure very costly. Public officials, however, who assume the risk of public office,[136] should debate in the public arena and not wage their battles in court.

Such a rule could also encourage settlements, as the risk of going to trial would fall more equally on either side of the claim. Similarly, part of the settlement agreement could include some type of retraction statement by the defendant, or some free editorial space.

CONCLUSION

First amendment guarantees should be of primary concern when dealing with issues as sensitive as what can and cannot be published,

135. *See* Scrapping Times v. Sullivan, Am. Law., Sept. 1984, at 12.

136. *See supra* note 41-44 and accompanying text.

and what can and cannot be broadcast. "Those guarantees [of the first amendment] are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society."[137] As we consider the prospects of war in the Middle East or in Central America, the lessons of our failure in Vietnam are no less controversial today than they were a decade ago. Discussion of these issues, which may lead to sharp disagreements, is vital to the ability of the public and the government to make informed decisions. Free discussion requires the "breathing space" of absolute protection against the expense of defending debilitating, harassing libel suits.

Requiring trial judges to carefully examine libel charges, spreading the risk of litigation costs, and denying punitive damages are some of the ways to free the press from the inhibition of libel suits. As Justice Harlan explained: "Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. 'The marketplace of ideas' where . . . ['public attention creates the strong likelihood of a competition among ideas'] still remains the best testing ground for truth."[138]

by RONIT MANDELBAUM

137. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

138. *Id.* at 406 (Harlan, J., concurring in part and dissenting in part) (citation omitted).

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