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SULLIVAN'S PARADOX: THE EMERGENCE OF JUDICIAL STANDARDS OF JOURNALISM*

BRIAN C. MURCHISON, JOHN SOLOSKI, RANDALL P. BEZANSON,
GILBERT CRANBERG, ROSELLE L. WISSLER**

In this Article, Brian C. Murchison, John Soloski, Randall P. Bezanson, Gilbert Cranberg, and Roselle L. Wissler examine the development of libel law in America since the United States Supreme Court's watershed decision New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and suggest that Sullivan affords members of the press less protection than many have hitherto believed.

According to the authors, Sullivan's actual malice standard of care invites judges to create norms of acceptable journalistic conduct for all three stages of news gathering, namely, research, writing, and editing. These norms are reflected in judicial decisions, which members of the press and their lawyers use as maps to navigate around libel liability.

The authors examine a large number of these judicial decisions and note the types of journalistic conduct at issue in libel cases. They highlight the types of conduct courts view positively and suggest strategies for defending libel lawsuits. The authors also examine the modes of decision making that courts employ in libel decisions and suggest that judges may

* This Article represents the third component of the Iowa Research Project, a twelve-year project that investigated, first, the operation of the libel tort, and second, the use of alternative dispute resolution in libel litigation. For the earlier work of the Project, see RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* (1987); Roselle L. Wissler et al., *Resolving Libel Disputes Out of Court: The Libel Dispute Resolution Program*, in *REFORMING LIBEL LAW* (John Soloski & Randall P. Bezanson eds., 1992).

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take a more restrictive approach in cases concerning research than in cases concerning writing and editing.

The problem with these judicial decisions, according to the authors, is that they leave judges considerable leeway to decide cases the way they want to decide them. This problem presents a serious threat to press freedom. Thus, the authors urge law reformers to abandon Sullivan's actual malice standard and adopt alternative forms of First Amendment protection.

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INTRODUCTION

In *New York Times Co. v. Sullivan*,¹ the United States Supreme Court fashioned a rule to protect the "citizen-critic of government,"² including the press, from libel judgments based on publications about the conduct of public officials. The rule required officials bringing libel actions to prove actual malice, defined as knowledge of falsity or reckless disregard of the truth.³ In a "majestic opinion" ⁴ that transformed the common-law tort of libel, the Court placed libel suits in the context of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."⁵ The Court's new rule would serve this ideal of democratic debate, allowing the press to report and editorialize without the chill of potentially debilitating libel suits. Journalism was to be free from the supervision of libel law; only a calculated lie would endanger that freedom.

For many, the *Sullivan* decision was cause for celebration.⁶ In a period of complex social struggle and change,⁷ the case allowed the press a measure of "breathing space" ⁸ to operate without the specter of strict liability for defamatory error. With journalists free to work without fear or favor, responsibility for the press's performance, except in the rare instance of "actual malice," lay with the press itself.

1. 376 U.S. 254 (1964).

2. *Id.* at 282.

3. *Id.* at 279-80.

4. First Amendment lawyer Floyd Abrams, *quoted in* ANTHONY LEWIS, *MAKE NO LAW, THE Sullivan Case and the First Amendment* 156 (1991).

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

6. 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 (citing conversation with philosopher Alexander Meiklejohn who said the decision was "an occasion for dancing in the streets").

7. See generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* (1988) (detailing the social unrest during the Civil Rights Movement).

8. *Sullivan*, 376 U.S. at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Thirty years later, however, the promise of *Sullivan* remains unfulfilled. Libel litigation has not disappeared.⁹ The specter of unpredictable litigation and large libel judgments has been replaced by the certainty of legal costs that make the judgment in *Sullivan* pale in comparison. While the incidence of judgments against the press is very low, as *Sullivan* promised, the cost to the press of obtaining favorable judgments is crushing. As observed more than six years ago, libel plaintiffs often "win" by losing and, more important for present purposes, libel defendants—the press—almost always "lose" by winning.¹⁰

Even more disturbing are ominous signs that the freedom from judicial supervision intended by the *Sullivan* rule has been compromised by the rule's own logic. *Sullivan* did not free the press to do its job; it did not lift the burden of intrusion and second guessing that the Court had associated with the common-law tort of libel. Instead, by

9. Libel cases continue to be filed on a regular basis. See, e.g., *Berry Gordy Files \$250 Million Libel Suit Against New York Daily News*, JET, May 9, 1994, at 53 (reporting a public figure's libel suit against a newspaper for republishing charges of misconduct); Philip Elmer-Dewitt, *Battle for the Soul of Internet*, TIME, July 24, 1994, at 50, 55-56 (reporting the filing of a libel suit based on a reporter's story published on Internet); *Front End: Litigation—Comaford v. Wired*, INFO. WK., July 11, 1994, at 10 (reporting a \$40 million libel action brought against magazine); Joseph Gerth, *Russell County Foes in Libel Suits Claim Attacks Are Unfair*, THE COURIER-JOURNAL (Louisville, Ky.), July 5, 1994, at 1A (recounting a series of libel suits brought by local official against a newspaper and the newspaper's fears of being forced out of business as a result); Howard Kurtz, *Fall-out From Faked Photos*, WASH. POST, Aug. 12, 1994, at F1, F6 (reporting a \$33 million libel suit filed by a "whistle-blower" against *Time* magazine and its managing editor).

While libel lawsuits are often filed, the number of libel trials may be diminishing. The Libel Defense Resource Center ("LDRC"), which gathers data on libel trials and damage awards, reported in early 1994 that the number of libel trials in the two-year period between January 1, 1992 and December 31, 1993 dropped to the lowest figure in fourteen years, although the average damage award entered against media defendants remained in excess of \$1 million. *Trial Results, Damage Awards and Appeals, 1992-93: Is the Recent Downward Turn in Libel Cases Tried, Media Losses and Damages Awarded a Blip or a Trend? Too Early To Tell*, LDRC BULL. (Libel Defense Resource Center, New York, N.Y.), Jan. 31, 1994, at 1. The LDRC cautions against "overstat[ing] the significance" of these findings. *Id.* at 2. Noting that "experience in this area has shown that a long-term trend cannot be projected based on data for such a brief period," the LDRC cited the fact that in 1987-88 it found a reduction in the average damage award to below \$500,000, "only to see the average award skyrocket in succeeding years to \$4 million and then to more than \$8 million by the 1990-91 period." *Id.*

There is some doubt whether *New York Times Co. v. Sullivan* itself can be credited with any reduction in libel litigation. Professor Diane Zimmerman noted at a recent program of the Practicing Law Institute on libel litigation that she "had encountered no analysts who could state with confidence that the Supreme Court's 1964 decision in *Sullivan* has reduced the amount, cost, or uncertainty of libel litigation." *PLI Conference Considers Life After Sullivan*, News Notes, Media L. Rep. (BNA), June 28, 1994.

10. RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 181-82 (1987).

permitting the use of circumstantial evidence of journalistic behavior to prove the journalist's state of mind, the *Sullivan* rule has spawned a *de facto* set of judge-made standards that covers all aspects of journalistic behavior. These standards include the use of sources, the quality of writing, the demand for corroboration, the duties of editorial supervision, and the use of quotations.

A press that so staunchly defends its freedom that it rejects the idea of setting its own detailed industry-wide standards¹¹ has unwittingly relinquished a large measure of that freedom to federal and state judges who are now engaged in an exhaustive standard-setting enterprise. How could this have happened? How is this taking place? Why has the press not objected to—or, it seems, not even detected—the phenomenon? Is freedom from ultimate financial liability so valuable that it should be purchased at the cost of judicial regulation of the press? Is freedom of journalistic process, of control over inquiry and investigation, of choice of material, of confidentiality, and of editorial judgment over style and content, expendable under the First Amendment?

Hints of these problems surfaced as we explored the libel litigation process over the last twelve years.¹² We began by seeking to understand the operation of the libel tort, the dynamics of the litigation process, the actions of the parties to this peculiar and often paradoxical legal action, and the costs the libel system was imposing on freedom of expression.¹³ Yet as we saw the problems that plagued the libel tort, it became apparent that the principal party in interest, the press, had little interest in questioning the underlying system and little inclination to grapple with its hidden costs. Few perhaps understood the costs: judicial intrusion and ultimate loss of control over the practice of journalism. Almost no one was prepared to trace the problems to *Sullivan's* requirement that public plaintiffs prove state of mind as part of their *prima facie* case.

The purpose of this project, then, is to examine the unhappy effects of the *Sullivan* rule, that is, the extent to which the body of judicial decisions in libel cases is becoming, if it has not already become, the effective source of standards of journalism in the United States.

* * * *

11. Many individual newspapers do have detailed internal standards, but there are no comparable industry-wide rules. See Lynn Wickham Hartman, Contemporary Studies Project, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 639-42 (1987).

12. See BEZANSON ET AL., *supra* note 10, at 198-99, 208 (observing the role of courts in setting standards of professional conduct).

13. *Id.* at 170-227.

The materials for this study are the words of the courts themselves: judicial opinions in libel actions, particularly judicial discussions of fault. These discussions usually pertain to the plaintiff's evidence. The burden on plaintiffs to prove fault often involves introducing evidence about press behavior in researching, writing, and editing the challenged stories. Whether in ruling on motions for summary judgment or reviewing jury verdicts, courts inevitably evaluate journalistic behavior disclosed by the evidence. Out of such evaluations have come judicial statements about many aspects of the practice of journalism. We hypothesized that these statements may contain explicit or implicit guidelines for the profession of journalism, a development that, if true, would be of considerable interest to a profession that has declined to develop a set of comprehensive rules for itself and sees *Sullivan* and its progeny as generally helpful to its interests.

To explore the hypothesis, we engaged in a two-part investigation. First, we asked: What sorts of press behavior are the courts examining, and which behaviors appear to be important in their decisions? Second, we asked: How do courts treat these behaviors when deciding cases, and how do judges use discussions of behavior in prior cases to resolve the libel actions before them?

In Part I we examine why press performance plays a critical role in determining the outcome of libel cases. We begin by reviewing four important cases in which the Supreme Court addressed the issue of journalistic performance as evidence of reckless disregard,¹⁴ which is one of the two categories of actual malice.¹⁵ We then identify the journalistic behaviors that are most frequently at issue in libel cases involving the media.¹⁶

14. See *infra* notes 19-74 and accompanying text.

15. *Sullivan*, 376 U.S. at 280. The Supreme Court defined actual malice as publication of false information "with knowledge that it was false *or* with reckless disregard of whether it was false or not." *Id.* (emphasis added). Thus, the fault requirement may be met in either of two ways: by showing knowledge of falsity or by showing "reckless disregard," in accordance with the meaning that courts have given the latter phrase over time. See *infra* text accompanying notes 24-74. Understandably, cases involving proof of knowledge of falsity are most unusual. See MICHAEL F. MAYER, *THE LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY* 20 (1987) (noting that it is a "rare case" in which "a court can find that a defendant knew his comments were false"). As we explain in Part I, only seven percent of the cases examined in the present study concluded that the evidence was adequate to support a finding of intentional falsity. See *infra* note 85 and accompanying text. Thus, the focus of our study is the much larger set of cases involving proof of reckless disregard.

16. See *infra* notes 75-288 and accompanying text.

Other studies have examined how courts evaluate journalistic performance as evidence of reckless disregard.¹⁷ These studies identified the types of journalistic behaviors that were likely to lead to media liability in libel cases. Our study examines the meaning of fault from another angle. Rather than focusing on selected decisions, we examined all libel cases reported in Volumes 2-17 of the *Media Law Reporter* in which courts discussed any type of journalistic performance. The large number of cases permits a more detailed study of the journalistic behaviors at issue in libel cases. To the extent that courts view certain behaviors positively, the data also suggest strategies for defense. While many of the findings reported in Part I are in line with those of the previous studies, our data make possible a more comprehensive picture of the behaviors addressed by courts, and thus a more complete assessment of judicial involvement in issues of journalistic performance.

In Part II, we move from the behaviors themselves to the modes of decision making used by courts when they evaluate press performance. Judicial discussion of research, writing, and editing dominated the libel decisions examined in the study. Through various techniques, courts have stated or strongly suggested the sorts of behavior that will be required of reporters and editors. Part II examines three modes of judicial decision making in setting journalistic norms, and points out dangers or uncertainties associated with each.

Our analysis of libel decisions led to the following conclusions:

- The freedom of the press sought to be furthered by *New York Times Co. v. Sullivan*¹⁸—the freedom to investigate and publish news without the chilling effect of intrusion by the judicial system—has been significantly undermined by developments traceable to the logic of *Sullivan* itself. While the actual malice privilege helps to ensure that the outcomes of most libel cases are favorable to the media, *Sullivan* has had a paradoxical effect on press freedom. In the very process of implementing the actual malice privilege, courts have developed an increasingly comprehensive and intrusive set of behavioral standards for the press.

- These standards embrace a wide range of journalistic behaviors, from the purely compositional aspects of writing and editing to such conventional details of journalistic research as corroboration and investigation.

17. *E.g.*, BRUCE W. SANFORD, LIBEL AND PRIVACY § 8.4 (Supp. 1993); RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 3.17-3.23 (1992); Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 259-335 (1985).

18. 376 U.S. 254 (1964).

- While the essential dynamic at work in libel decisions—the proliferation of objective indicia of mental state—is a familiar one at common law and should not be surprising, the standards-creating enterprise is fundamentally and jarringly at odds with *Sullivan*’s press-protective spirit.

- Judges have developed at least three modes of analyzing press behavior: discussion of press behavior considered egregious, producing an explicit or implicit restrictive norm; fact-oriented discussion of press behavior, producing an implicit restrictive norm; and law-oriented discussion of press behavior, producing an explicit permissive norm. These modes of analysis cut across categories of cases reflecting the three principal stages of the journalistic process: research, writing, and editing.

- Judges appear more willing to imply restrictive norms in discussions of journalistic research than in discussions of writing and editing. This tendency may reflect a perceived distinction between “objective” and “subjective” aspects of the journalistic process, with greater judicial solicitude for the subjective aspects, i.e., the compositional or creative realms of the profession.

- Judicial discretion in a given case to adopt one mode of analysis instead of another, and to emphasize one sort of behavior over another, allows courts considerable leeway to decide libel cases the way they want to decide them.

We also conclude that the study has implications for the profession of journalism and the future of libel law in the United States:

- The journalistic profession should question whether it is desirable for courts to be engaged in the explicit and implicit fashioning of professional standards, a role that allows courts to intrude into the autonomy of the press and encourages an oversight role for lawyers in the journalistic process and in editorial decision making.

- United States law should consider abandoning the actual malice requirement that has led to the phenomenon discerned in the present study, and explore alternative forms of First Amendment protection.

The Article thus demonstrates the way in which judges are creating a unique kind of regulatory system for the press. The behavioral focus of the libel tort has resulted in a system in which professional norms are the by-products of much litigation. The behaviors examined by the courts are wide-ranging, and the techniques of norm-creation can be straightforward or, as is often the case, sufficiently subtle to avoid drawing attention to the judicial role. Even though the norms are often generous to the press, the regulatory system of mod-

ern libel law, properly understood, presents a serious threat to press freedom because it makes the courts the ultimate arbiters of press behavior.

I. ASSESSING PRESS BEHAVIOR IN LIBEL CASES

A. *Origins of Standards-Creation in Libel Decisions*

The judicial creation of journalistic standards arises from two dynamics: one related to process, the other to substance. The first dynamic is the common law process—the development, over time, of a set of objective guidelines to meet a subjective test of liability. In the context of the libel tort, this process has involved the accumulation of behavioral norms under the actual malice test.

The second dynamic is a substantive judicial effort to respond to the perceived power of the press, particularly the press's role as a formidable checking institution in a democratic society. Many judicially-created norms are permissive; they accord the press wide leeway in fulfilling its checking function through the gathering and publication of news and commentary. Other judicially-created norms are relatively demanding, insisting on certain levels of press responsibility and thereby culminating in an aggregate of legal duties.

Thus, journalistic standards emerge from a combination of factors. An abstract requirement of intent or recklessness begets pragmatically developed objective indicia with the potential to assume a life of their own. At the same time, courts ruling on motions and reviewing verdicts focus on the substantive balance of freedom and restraint appropriate for a vital cultural entity such as the press.

1. The Common-Law Process

The common-law dynamic can be illustrated by a survey of four Supreme Court cases: three seminal decisions from the first decade of the constitutionalized tort, and a recent case in which the process of objectifying the subjective test of liability continued.

In *New York Times Co. v. Sullivan*,¹⁹ the Supreme Court transformed the libel tort from a strict-liability cause of action to a fault-based cause of action; the Court defined "fault" with reference to the publisher's state of mind.²⁰ This change made journalistic conduct an essential focus of libel litigation.²¹ Because direct evidence of mental

19. 376 U.S. 254 (1964).

20. *Id.* at 279-80.

21. See *Herbert v. Lando*, 441 U.S. 153, 160 (1979) (discussing the relevance of evidence of journalistic conduct).

state rarely is available, post-*Sullivan* plaintiffs have attempted to prove the requisite mental state through inferences from conduct.²² Before *Sullivan*, details of journalistic behavior were relevant only on the issue of punitive damages and the applicability of certain privileges.²³ *Sullivan*, however, dictated that a public-official plaintiff's case include clearly convincing evidence of intentional falsity or reckless disregard of the truth by the defendant in developing and publishing the contested information.²⁴

The *Sullivan* Court applied the test by discussing and characterizing the *Times*' pre-publication behavior, particularly its failure to verify the accuracy of the disputed advertisement.²⁵ The Court first stressed that the "mere presence" of conflicting stories in the *Times*' files "does not, of course, establish that the *Times* 'knew' the advertisement was false."²⁶ The Court then stated that responsible persons at the *Times* relied on the "good reputation[s]" of the transmitter of the advertisement and those who had signed it,²⁷ a finding relevant to the "reckless disregard" prong of the actual malice test. However, the Court also stated that the *Times* was "reasonable" in believing the advertisement to be " 'substantially correct' " and was "not unreasonable" in not perceiving the advertisement to be a personal attack.²⁸ "Reasonable" behavior and judgment therefore were relevant to the inquiry into mental state.

Surely part of Justice Black's refusal to acquiesce in the actual malice test²⁹ was a sense that intimations of unreasonableness would lead judges (and juries) too swiftly to conclude that the actual malice test had been met. Hence Justice Black's somber warning: "The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."³⁰

22. *Id.* at 160.

23. *Id.* at 164-67.

24. *Sullivan*, 376 U.S. at 286-88 (analyzing the *New York Times*'s process of publishing the defamatory advertisement).

25. *Id.* at 287-88.

26. *Id.* at 287.

27. *Id.*

28. *Id.* at 286-87.

29. *Id.* at 293-97 (Black, J., concurring).

30. *Id.* at 293 (Black, J. concurring). Justice Black interpreted the First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech or of the press," U.S. CONST. amend. I, to guarantee "the people and the press" freedom "to criticize officials and discuss public affairs with impunity." *Sullivan*, 376 U.S. at 296 (Black, J., concurring).

In *Curtis Publishing Co. v. Butts*,³¹ the process of elaborating the actual malice test continued. There the Court split on the appropriate level of fault that a public figure, rather than a public official, should be required to prove in a libel action. Five members of the Court voted for either the actual malice test or absolute immunity for the press.³² The four remaining Justices preferred what they considered a lesser standard of fault for public-figure plaintiffs, namely, a showing that the media defendant engaged in "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."³³ Thus, while the case yielded a subjective test of fault, a minority embraced an objective standard akin to gross negligence or gross irresponsibility to be applied (it seemed) by comparing the behavior at issue with professional standards.

It is unlikely that any significant practical difference existed between the two formulations in terms of the behavioral evidence that would be considered relevant under each. In applying the actual malice test and upholding a jury verdict against the *Saturday Evening Post*, Chief Justice Warren "measured . . . the conduct of the publisher" in two paragraphs that also explicitly referenced and adopted Justice Harlan's analysis of the facts in applying the "extreme departure" test.³⁴ The Chief Justice noted the defendant's commercial motivation for changing its "image" and adopting a provocative style of "sophisticated muckraking."³⁵ He also noted the defendant's "slipshod and sketchy investigatory techniques";³⁶ its lack of further investigation once apprised of the plaintiff's position (and that of the plaintiff's daughter) that the story about to be published was false;³⁷ and its awareness of the harm that would result from publication.³⁸ However, the Chief Justice glossed over the critical step of linking these objective behaviors to a conclusion about mental state. He simply finished the discussion with the statement: "I am satisfied that the

31. 388 U.S. 130 (1967).

32. Chief Justice Warren, Justice Brennan, and Justice White agreed that the actual malice test should apply. *Id.* at 162-65 (Warren, C.J., concurring in the result), 172 (Brennan, J., concurring in the result). Justice Black and Justice Douglas took the view that the First Amendment prohibited any libel judgments against the press. *Id.* at 170-72 (Black, J., concurring in the result).

33. *Id.* at 155. Justice Harlan, writing for the Court, was joined by Justices Clark, Stewart, and Fortas. *Id.* at 133.

34. *Id.* at 163-69 (Warren, C.J., concurring in the result).

35. *Id.* (Warren, C.J., concurring in the result).

36. *Id.* (Warren, C.J., concurring in the result).

37. *Id.* at 169-70 (Warren, C.J., concurring in the result).

38. *Id.* at 170 (Warren, C.J., concurring in the result).

evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times*”³⁹

The Chief Justice’s opinion thus insisted on a subjective test, but focused on the unprofessional quality of the defendant’s conduct with a blunt-edged conclusory holding that the requisite mental state had been proven. The clear signal was that behavioral analysis was inevitable and that an exacting delineation of the nexus between behavior and state of mind was not necessary.

Despite his use of a different standard of fault, Justice Harlan’s approach to the facts was not far-removed from Chief Justice Warren’s approach. Although favoring a rule that would test for “extreme departure from the standards of investigating and reporting ordinarily adhered to,”⁴⁰ Justice Harlan did not discuss such standards, and certainly did not measure the defendant’s conduct against any specific external rule. Instead, like the Chief Justice, Justice Harlan concentrated on the defendant’s own behavior. Indeed, Justice Harlan appeared to equate his test of “extreme departure from the standards of investigating and reporting ordinarily adhered to” to a shorter formulation: “investigation [that was] grossly inadequate in the circumstances.”⁴¹ This formulation dispensed with comparisons to ordinary professional behavior and focused on the defendant’s behavior alone.

Some lower courts mistook Justice Harlan’s opinion to be the controlling opinion in *Curtis* and employed the “extreme departure” test in cases involving public figures.⁴² Other courts equated Justice Harlan’s short formulation—“investigation [that was] grossly inadequate under the circumstances”—with the actual malice requirement,⁴³ although this does not appear to have been Justice Harlan’s meaning. A number of subsequent appellate decisions applying the actual malice test⁴⁴ have addressed whether press conduct was

39. *Id.* (Warren, C.J., concurring in the result).

40. *Id.* at 155.

41. *Id.* at 156.

42. See, e.g., *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, 840-44 (6th Cir. 1988) (relying in part on Justice Harlan’s formula), *aff’d*, 491 U.S. 677 (1989). But see *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) (clarifying the actual malice test).

43. See, e.g., *Vandenburb v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971).

44. See, e.g., *Hunt v. Liberty Lobby*, 720 F.2d 631, 643, 10 Media L. Rep. (BNA) 1097, 1106 (11th Cir. 1983); *Silvester v. ABC, Inc.*, 650 F. Supp. 766, 779, 13 Media L. Rep. (BNA) 1817, 1826 (S.D. Fla. 1986), *aff’d*, 839 F.2d 1491, 15 Media L. Rep. (BNA) 1138 (11th Cir. 1988); *Pemberton v. Birmingham News Co.*, 482 So. 2d 257, 266, 12 Media L. Rep. (BNA) 1465, 1472 (Ala. 1985); *Fisher v. Larsen*, 188 Cal. Rptr. 216, 226 (Cal. Ct. App. 1982), *cert. denied*, 464 U.S. 959 (1983).

"grossly inadequate under the circumstances" and have produced considerable discussion about specific journalistic behaviors.

In *Curtis*, then, both camps focused on conduct. Because the same conduct "counted" in both Chief Justice Warren's subjective inquiry and in Justice Harlan's objective inquiry, the difference between the two, even if technically clear, was practically blurred. What remained indisputable was that press behavior was central to libel litigation and that judges would engage in analysis and characterization of the behavior as a matter of course.

A third major case, *St. Amant v. Thompson*,⁴⁵ again rallied behind the subjective test of actual malice and then proceeded to list objective behaviors that could be used by plaintiffs to meet the test. In effect, the opinion provided two principal quotations for divergent use by the lower courts: one stressing mental state and the other stressing objective analysis.

The first passage affirmed the actual malice test as different in kind from any test of negligence: The "cases are clear," the Court stated, "that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."⁴⁶

However, another passage in *St. Amant* emphasized the objective evidence that may be offered as proof of actual malice. In language reminiscent of Justice Harlan's opinion in *Curtis*, the Court held that a media defendant will not "be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."⁴⁷ The key words were "inherently" and "obvious." They suggested that if published allegations would have appeared "inherently improbable" to a reasonable person, or if reasons to doubt a source would have been "obvious" to a reasonable person, a jury could infer reckless disregard. The practical meaning of these words would become the subject of a number of subsequent appellate decisions discussing and evaluating press behavior and, in the process, signalling norms of journalistic research.⁴⁸

45. 390 U.S. 727 (1968).

46. *Id.* at 731.

47. *Id.* at 732.

48. See *infra* notes 95-115 and accompanying text (discussing cases involving use of an unreliable source), and notes 122-27 and accompanying text (discussing reliance on an "im-

These early cases demonstrate how the addition of state-of-mind to the public plaintiff's case led to judicial analysis of journalistic behavior and how judicial opinions began to be vehicles for statements of journalistic standards. In *Harte-Hanks Communications, Inc. v. Connaughton*,⁴⁹ the Court contributed further to what it called the "case-by-case adjudication [through which] we give content to these otherwise elusive constitutional standards."⁵⁰ As in *St. Amant*, the Court affirmed the actual malice standard.⁵¹ At the same time, the Court upheld a verdict against a media defendant based on inferences drawn from omissions in verification.⁵² Where the defendant had chosen not to interview an important source and not to listen to relevant recorded tapes of that source, the Court posited a "purposeful avoidance of the truth" supporting the jury's verdict for the plaintiff.⁵³

"Purposeful avoidance of the truth," like the phrases "inherently improbable" and "obvious reasons to doubt," called for a conclusion about state of mind based on evaluation of behavior. Writing for the Court in *Harte-Hanks*, Justice Stevens indicated that journalistic behavior was relevant, at the very least, to credibility. For example, Justice Stevens found the defendant's omissions "utterly bewildering in light of the fact that the [defendant] committed substantial resources to investigating [another source's] claims."⁵⁴ In addition, Justice Stevens found the omissions "difficult to understand,"⁵⁵ given the defendant's claim that it was about to decide whether to endorse the plaintiff in a political race. He noted that "an editor in the process of determining which candidate to endorse would normally have an interest [in the omitted research.]"⁵⁶ Again, Justice Stevens seemed to suggest what credible editorial behavior should look like (although he cited no expert information for his view). Thus, determining whether there was a "purposeful avoidance of the truth" involved the preliminary step of evaluating conduct, including what was done, what was left out, and why. These preliminary speculations were the stuff of standards-creation.

probable" source in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989)).

49. 491 U.S. 657 (1989).

50. *Id.* at 686.

51. *Id.* at 666-67.

52. *Id.* at 688-93 (independently reviewing a finding of actual malice).

53. *Id.* at 692.

54. *Id.* at 682.

55. *Id.* at 683.

56. *Id.*

2. Substantive Policy Making

Norms are also a function of substantive judicial concerns about power. Another look at the four cases discussed above reveals that judge-made norms derive in part from judicial perceptions of press power. Permissive norms encourage the power of the press as a vital checking institution in a democratic society, while restrictive norms respond to a perceived need to check the press's unique ability to inflict harm on individuals and to disserve the public.

New York Times Co. v. Sullivan declared that the mere failure to investigate a factual assertion that turns out to be false does not constitute actual malice.⁵⁷ This declaration produced a permissive norm: a newspaper need not investigate the accuracy of a statement as long as it does not doubt the statement's truth. The background of this norm was the Court's effort to secure "breathing space" for the press, a margin of error to facilitate coverage of "the major public issues of our time."⁵⁸ With its explicit references to the instrumental value of citizen criticism of government,⁵⁹ and to the inconsistency between the Sedition Act of 1798 and the First Amendment,⁶⁰ the *Sullivan* Court focused on the press's function of checking governmental authority through informing and enlightening the public. *Sullivan*'s permissive norm of investigation of factual accuracy derived in part from the Court's substantive interpretation of the First Amendment as protecting the checking function and hence a range of press behaviors.⁶¹

In *Curtis Publishing Co. v. Butts*, the Court recognized another power inherent in the press: the potential, as Chief Justice Warren

57. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964).

58. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

59. *Id.* at 269-70.

60. *Id.* at 273-76. As Justice Brennan noted, the Sedition Act made it a crime, punishable by a \$5,000 fine and five years in prison,

if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

Id. at 273-74. Justice Brennan pointed out that both Thomas Jefferson and James Madison attacked the Act as unconstitutional, and that while the Act was never tested in the Supreme Court, "the attack upon its validity has carried the day in the court of history." *Id.* at 274-76. The Justice noted "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." *Id.* at 276.

61. For a thoughtful discussion of this function, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521 (1977).

wrote, "to destroy lives or careers."⁶² The Chief Justice's comment was oddly consistent with his discussion in the same case of the magnitude of non-governmental institutional power in the United States. In discussing the "public figure" issue, the Chief Justice wrote: "[P]ower has . . . become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations . . ."⁶³ While Chief Justice Warren clearly was not consciously referring to press corporations, this comment perhaps reflected a general concern for checking a range of powerful institutions outside government. It is interesting that this concern was consistent with his impatience with the press behavior in *Curtis* and his conclusion that "[f]reedom of the press under the First Amendment does not include absolute license to destroy lives or careers."⁶⁴ The norms—in this case, restrictive norms—apparently backed by both Justices Warren and Harlan⁶⁵ were that reporters should verify serious allegations received from a suspect source with available independent sources, and that editors should require verification of serious allegations when their reporters lack expertise in the subject matter and may not be fully objective.⁶⁶

*St. Amant v. Thompson*⁶⁷ brought together the substantive concerns of both *Sullivan* and *Curtis*. On the one hand, *St. Amant* affirmed *Sullivan*'s commitment to the power of the press to check government with respect to "public business."⁶⁸ Hence, the first principal quotation discussed earlier⁶⁹ stressed the highly protective subjective test of actual malice. On the other hand, *St. Amant* grasped

62. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring in the result).

63. *Id.* at 163 (Warren, C.J., concurring in the result).

64. *Id.* at 170 (Warren, C.J., concurring in the result). For commentary on the regulation of the press from the standpoint of power relationships, see Marshall S. Shapiro, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEX. L. REV. 650 (1968).

65. Compare Justice Harlan's application of the "extreme departure" test to the facts of *Curtis*, 388 U.S. at 156-58, with Chief Justice Warren's application of the actual malice test in the same case, *id.* at 169-70 (Warren, C.J., concurring in the result). Both opinions concentrate on essentially the same press behavior offered as evidence in the case, with the Chief Justice making additional comments about the *Saturday Evening Post*'s motivation. *Id.* (Warren, C.J., concurring in the result).

66. See *id.* at 169-70 (Warren, C.J., concurring in the result).

67. 390 U.S. 727 (1968).

68. *Id.* at 731-32.

69. See *id.* at 731; see also *supra* note 46 and accompanying text.

the lessons of *Curtis*—the power of the press to destroy as a result of grossly inadequate investigation. The second passage in *St. Amant*⁷⁰ thus affirmed the behavioral language and focus of the Justices in *Curtis*. *St. Amant*, in effect, allowed the press to check power but also subjected the press itself to the check of behavioral norms.

By the time *Harte-Hanks Communications, Inc. v. Connaughton*⁷¹ was decided at the end of the 1980s, the Court's experience with press cases had disclosed another power of the press, perhaps more subtle than either the noble power to check or the pernicious power to destroy. *Harte-Hanks* concerned a much more difficult-to-observe power: the power to influence political events—in that case, an election—through the release of incompletely researched information.⁷² In preparing an account of alleged "dirty tricks" by a political candidate, the media defendant cut short its research and produced what the plaintiff, the jury, and the Supreme Court regarded as a report that omitted important, relevant facts.⁷³ A concern for the press's ability to engage in subtle political distortion by omission may well have prompted the Court's adoption of the category "purposeful avoidance of the truth."⁷⁴

3. Conclusion

The intersection of a procedural dynamic and a substantive concern has produced a regulatory system for the journalistic profession. The procedural dynamic is the common-law process of fleshing out the libel tort's element of fault, first through a catch phrase such as "reckless disregard," then through phrases such as "obvious reasons to doubt" and "purposeful avoidance of the truth," and finally through identification of behaviors deemed relevant to the meaning of those phrases. The substantive concern is the judiciary's perceived responsibility to balance freedom and restraint of the press in society through a combination of permissive and restrictive professional standards. Through the law of libel, judges have filled a vacuum, indicating what will pass for acceptable journalism.

70. See *id.* at 732; see also *supra* note 47 and accompanying text.

71. 491 U.S. 654 (1989).

72. *Id.* at 692 (viewing the newspaper's insufficient research as "a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [charges published against candidate for office]").

73. See, e.g., *id.* at 682.

74. *Id.* at 692.

B. Journalistic Behaviors in the Adjudication Process

1. The Study: Objectives and Methods

Here we identify the journalistic behaviors that courts have discussed in libel decisions involving actual malice. Our purpose is to show the extent to which courts have evaluated journalistic performance. We find that courts have considered virtually all aspects of the journalistic enterprise, from the gathering of information by reporters to the writing, editing and presentation of stories.⁷⁵

To identify the types of behavior that have come under scrutiny, the Iowa Libel Research Project⁷⁶ analyzed all libel cases reported in Volumes 2-17 of the *Media Law Reporter*⁷⁷ in which courts discussed any type of journalistic performance. Most of the excluded cases dealt with procedural issues or with the determination of a plaintiff's status as public or private.

We completed a questionnaire for each case. The questionnaire elicited detailed information, such as the year of the decision, the level of judicial activity, the plaintiff's legal status, and the case outcome. The questionnaire also elicited information on four key variables, where applicable: the journalistic behaviors at issue in each opinion; the reasons given by the court for determining the appropriateness or inappropriateness of the journalistic behaviors; whether the court determined the truth or falsity of the challenged statements and, if so, the reasons given by the court; and the reasons given by the court for deciding the actual malice issue presented.⁷⁸

75. See Gilbert Cranberg, *Malice in Wonderland: Intrusion in the Newsroom*, Iowa Center for Communication Research (on file with the authors).

76. The Iowa Libel Research Project is a joint effort of the School of Journalism and Mass Communication and the College of Law at the University of Iowa and the School of Law at Washington and Lee University.

77. The study did not include Volume 1 of the *Media Law Reporter*. That volume gathers an array of cases considered by the editors to be the most significant media cases decided before January 1977. *Introduction*, 1 *Media L. Rep.* (BNA) vi (1978). Volume 2 gathers decisions published in loose-leaf form beginning January 11, 1977 and continuing through September 20, 1977. *Introduction*, 2 *Media L. Rep.* (BNA) v (1977). Subsequent volumes attempt to report all media cases decided in the United States. Volume 17 gathers cases published in loose-leaf form through September 25, 1990. The data base for the present study included cases from the beginning of Volume 2 through *White v. Fraternal Order of Police*, 909 F.2d 512, 17 *Media L. Rep.* (BNA) 2137 (D.C. Cir. 1990) in Volume 17.

The most current volume of *Media Law Reporter* is Volume 23. While we have not examined the cases in Volumes 18-23 in the same systematic way as the cases in the present study, we are aware of no cases therein that cast doubt on our conclusions about the cases in Volumes 2-17.

78. Our research also included all cases in which negligence was the standard of fault and all cases in which gross irresponsibility was the standard of fault. However, analysis of

Because most libel opinions are complex, two research assistants with the necessary legal training to comprehend the court's reasoning read each case.⁷⁹ To ensure accurate descriptions of the journalistic performance in the cases, research assistants with backgrounds in journalism evaluated and verified all of the questionnaires.⁸⁰ This method of data collection ensured that research assistants who were knowledgeable about both law and journalism read and coded each case.⁸¹

those cases is beyond the scope of the present Article. We deal here exclusively with actual malice cases, statistically a much larger group of cases than the negligence cases and the gross irresponsibility cases. See *infra* note 83 and accompanying text.

In some 34 jurisdictions, negligence is the standard of fault for private plaintiffs when the challenged statement involves a matter of public concern. See generally ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* § 5.9, at 340 (1994) (discussing jurisdictions that use the negligence standard). Gross irresponsibility is the standard of fault in New York for private plaintiffs when the challenged statement is "arguably within the sphere of public concern." *Id.* § 5.9.3, at 350 (citing *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571, 1 Media L. Rep. (BNA) 1693, 1694 (N.Y. 1975)).

79. After a case was selected, its first reader was a research assistant with a background in libel law, either a third-year law student or an attorney. This research assistant completed a questionnaire for the case. Then a second research assistant, either a third-year law student or an attorney, read the case. This research assistant verified all of the information contained in the questionnaire and coded it for computer entry. If there were disagreements between the second reader and the first, the questionnaire was set aside for further review.

80. If there were no disagreements between the first and second readers, the coded questionnaire was checked and verified by another research assistant who was a graduate student in journalism. If this research assistant disagreed with the coding of the questionnaire or if any of the information was unclear, the questionnaire was set aside for further review. If there were no disagreements, the coded information was entered into a computerized data base. For those cases in which there were disagreements among the research assistants, the case was read by another research assistant who attempted to resolve the disagreement. If that research assistant was unable to resolve the disagreement, the case was referred to one of the principal members of the Iowa Libel Research Project for a final decision.

81. The use of social science research methods to study libel litigation in the United States was pioneered by Marc Franklin. See generally Marc A. Franklin, *Suing The Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 797 (1981) [hereinafter Franklin, *Suing The Media*] (summarizing the results of nearly 300 libel cases brought against the media during a four-year period); Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455 (1980) [hereinafter Franklin, *Winners and Losers*] (summarizing the results of a study of over 500 reported defamation cases); see also BEZANSON ET AL., *supra* note 10 (analyzing the libel litigation process from the appearance of the alleged libelous story to the outcome of the case through interviews, surveys, case studies, and research of information drawn from media libel insurers). The findings of these studies yielded important information about libel litigation and resulted in the development of an alternative method for dealing with libel disputes. See John Soloski & Roselle L. Wissler, *The Libel Dispute Resolution Program: A Way to Resolve Disputes Out of Court*, in BEYOND THE COURTROOM: ALTERNATIVES FOR RESOLVING PRESS DISPUTES 83 (Richard T. Kaplar ed., 1991). These studies also resulted in legislative

The data gathered in this phase of the study disclosed the extensive range of journalistic behaviors discussed by the courts. We examine these behaviors below.⁸² Once these discrete behaviors were isolated and defined, we undertook the second part of the project: an examination of the nature of the courts' decision-making process involving journalistic performance. We grouped the discrete behaviors into categories reflecting three principal stages of journalistic practice: research, writing, and editing. We then analyzed a number of cases addressing charges of actual malice in each of these categories. In gauging the nature of judicial discussion of journalistic behavior, we looked for similarities or differences, or both, in the courts' approach to each category. In cases involving more than one category, we looked for indications of how the categories related to each other in the courts' analyses. We also examined whether, in cases involving more than one category, courts at different levels of review in the same case focused on different categories. We present findings and conclusions from this phase of the study in Part II.

2. Range of Behaviors Discussed by Courts

Most libel suits involving the media require plaintiffs to prove actual malice. Of the 840 cases in the present study, 449 were actual malice cases; that is, they discussed actual malice as the standard of fault the plaintiff was required to prove. Of these 449 cases, 421 discussed journalistic behavior as evidence of actual malice.⁸³

proposals for reforming libel law at both the federal and state levels. *Id.* (citing H.R. 2846, 99th Cong., 1st Sess. (1985) and state bills from California, Connecticut, Illinois, and Iowa). See also NORTHWESTERN UNIV. LIBEL REFORM PROJECT, THE ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR THE REFORM OF LIBEL LAW (1988) [hereinafter ANNENBERG PROPOSAL] (proposing a comprehensive model Libel Reform Act with an emphasis on nonmonetary damage remedies); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847 (1986) (arguing that libel defendants and plaintiffs should be given the option to choose declaratory relief in suits by public officials and public figures); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986) [hereinafter Franklin, *Declaratory Judgment Alternative*] (proposing a declaratory judgment remedy).

82. See *infra* notes 83-288 and accompanying text.

83. The 449 actual malice cases represent 53.5% of the cases in the study. There were 72 cases involving negligence (8.6% of the cases), 46 cases involving gross irresponsibility (5.5% of the cases), and six cases in which the fault standard was neither of the above (.7% of the cases). In 267 cases (31.8%), the courts did not discuss the standard of fault. In the 28 actual malice cases deleted from Table I (see Appendix), the courts did not address the media's journalistic behavior as evidence of actual malice.

Our finding that most libel cases involve actual malice is consistent with a finding in our previous study of cases decided between 1974 and 1984. Fifty-seven percent of those cases were brought by public officials or public figures who by virtue of their public status were required to prove actual malice. BEZANSON ET AL., *supra* note 10, at 101-03.

"Actual malice," of course, means publication either with knowledge of falsity or in reckless disregard of the truth.⁸⁴ In less than seven percent of the actual malice cases examined in this study did the courts find, or hold that a jury could find, that the media had knowingly published false information.⁸⁵ Most cases focused instead on reckless disregard and, more particularly, on the facts of journalistic performance offered by the plaintiff as circumstantial evidence.⁸⁶ We begin this section by identifying the range of those journalistic behaviors. Next, we examine a number of specific behaviors that figured prominently in judicial discussions of reckless disregard.

"Journalistic behavior" refers to specific types of journalistic performance at issue in the cases examined in the study. At the outset, it is important to note that, on average, between two and three journalistic behaviors were at issue in each case. Therefore, our data should not be interpreted to mean that any one behavior, by itself, can support a conclusion that a defendant acted in reckless disregard.

The journalistic behaviors at issue in the cases in this study have been grouped into thirty categories. These categories can be divided into two broad groups: one concerning the media's professional behavior and the other concerning behavior relating to the media's attitude towards the published material or the plaintiff.

The professional performance categories include use of a confidential source, use of an unreliable source, failure to verify a source's information, and use of a source who was hostile towards the plaintiff. The attitudinal categories include animosity toward the plaintiff, failure to verify the accuracy of information considered doubtful by the media, and publication of false information despite indications that the facts were false. These attitudinal categories are important in determining whether the media acted with reckless disregard. For example, a reporter's failure to verify information supplied by an unreliable source is, standing alone, usually not sufficient evidence to constitute reckless disregard.⁸⁷ However, if another clearly knowledgeable source is left unchecked, and the reporter or editor appears determined to publish a preconceived story critical of the plaintiff, the com-

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

85. In only 10% of the actual malice cases in the study did plaintiffs attempt to prove that the media had knowingly published false information.

86. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 682-91 (1989); *Herbert v. Lando*, 441 U.S. 153, 165 (1979).

87. See, e.g., *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 92-93, 6 Media L. Rep. 1438, 1442-43 (S.D.N.Y. 1980).

bination of the reporter's behavior and attitude is likely to lead to a finding that the defendant acted recklessly.⁸⁸

Table 1 (see Appendix) provides a complete list of both professional and attitudinal behaviors at issue in the 421 decisions in which actual malice was the standard of fault.⁸⁹ The behaviors are ranked according to the number of cases in which the behaviors were at issue.⁹⁰ The behaviors most often at issue in actual malice cases were failure to verify information provided by a source (29% of cases); unclear writing (28% of cases); failure to provide an accurate summary of information (26.6% of cases); and failure to investigate adequately the information in the story (23.3% of cases).

While the presence of these behaviors on the list is predictable in light of *Sullivan* and its progeny, the number of additional behaviors included in Table 1 is striking. They encompass every step in the journalistic process. In terms of research, they include use of an unreliable source (11.4%), failure to do more after receiving notice that a story contained false information (7.4%), use of a source known to be hostile to the plaintiff (5.9%), failure to contact an obvious source (3.3%), lack of a formal verification procedure (2.1%), and failure to find additional sources who would contradict information provided by other sources (1%). In terms of writing, these behaviors include exaggerated writing (8.8%), unbalanced writing (8.6%), and writing that omits pertinent information (5.9%). In terms of editing, they include failure to make a sufficient correction or apology (5.2%), editing in a way that leads to defamation (4.8%), use of an inaccurate headline (4%), and misuse of a photograph (2.1%). The scope of these behaviors demonstrates the pervasive entanglement of courts in analysis of journalistic performance.

Table 1 is not concerned with wins or losses in libel cases. The data do not indicate which of the behaviors are more or less likely to lead to a finding of reckless disregard. In fact, the behaviors at the top of the list—those most frequently at issue—are often of secondary importance in determining whether the media acted recklessly. For example, despite the large number of cases in which the clarity of the media's writing was at issue, there is not a single case in the study in which this behavior alone was cited as proof that the defendant had acted recklessly. To identify the journalistic behaviors that are impor-

88. See, e.g., *Harte-Hanks*, 491 U.S. at 683-85, 691-93.

89. See *supra* text accompanying note 83 (stating number of actual malice cases in which journalistic behavior was discussed).

90. The total percentage in Table 1 exceeds 100 percent because more than one behavior was cited in most cases.

tant in determining reckless disregard, the behaviors in Table 1 must be compared with the cases' outcomes, which we discuss next.

3. Impact of Behaviors on Case Outcomes

Statistical analyses of the data in Table 2 indicate that the following journalistic behaviors play an important role in determining reckless disregard:⁹¹ (1) use of an unreliable source; (2) failure to contact an obvious source; (3) failure to provide the plaintiff with an opportunity to respond to allegations before publication; (4) use of a confidential source; (5) failure to follow accepted journalistic practices; (6) republishing false information; (7) failure to include pertinent information in the story; (8) failure to correct or retract false information; and (9) publishing false information despite being informed before publication that the information was false. Each of these behaviors is examined below.⁹² We also examine two other behaviors that are frequently at issue in libel cases: failure to investigate adequately the information in the story and hostility towards the plaintiff.⁹³ We identify the circumstances in which these behaviors could support a finding of reckless disregard.

As shown in the following discussion, the media won most cases involving the nine journalistic behaviors identified above.⁹⁴ However, statistical analyses indicate that plaintiffs tended to do better when one or more of these nine journalistic behaviors were at issue. This does not necessarily mean that a plaintiff will prevail if the plaintiff proves that the defendant engaged in one of these behaviors. Rather,

91. The data in Table 2 were analyzed using a variety of multivariate techniques, particularly Classification and Regression Trees. These techniques are "multivariate" because they allow analysis of more than one variable at a time. This was important because more than one journalistic behavior was at issue in most of the cases examined in the study. Because the analyses using Classification and Regression Trees are lengthy, they have not been included in this article. The analyses are on file with John Soloski.

92. See *infra* notes 95-255 and accompanying text.

93. See *infra* notes 256-88 and accompanying text.

94. See *infra* notes 95-255 and accompanying text. In this Article, when we say a party "won" or "lost" a libel case, we mean the party received a favorable or an unfavorable ruling in court, in the context of either a motion, a verdict, or an appeal of a motion or a verdict. For example, a media defendant "loses" when the court denies its motion for summary judgment, when a verdict is entered for the plaintiff, or when an appeal is resolved against the media defendant. The fact that a media defendant "loses" a case does not mean necessarily that a finding of actual malice was made. A media defendant can "lose" if the court denies its motion for summary judgment on grounds that a jury reasonably could infer actual malice based on the evidence. By contrast, a media defendant "wins" if the court grants its motion for summary judgment, finding that an inference of actual malice could not be made on the evidence, if the plaintiff fails to win a verdict, or if a ruling unfavorable to the media on a motion or in a verdict is reversed.

a plaintiff's odds of prevailing increase, often only slightly, if the plaintiff succeeds in proving one of these behaviors.

a. Use of an Unreliable Source

A media defendant's use of an unreliable source, by itself, cannot establish liability, but it can be probative of reckless disregard.⁹⁵ Usually, the plaintiff must show that there were obvious reasons to doubt the source's reliability and that the defendant did not verify the source's information.⁹⁶

When examining the reliability of a source, courts probe a broad range of scenarios, such as use of information provided by a political enemy of the plaintiff;⁹⁷ use of information made problematic by the source's demeanor and by the known inaccuracy and obvious implausibility of some of the information;⁹⁸ and use of information attributed to unsubstantiated rumor.⁹⁹ Courts often link their discussion of a suspect source to the actual malice inquiry by asking whether "a trier of fact could find on the record that there were obvious reasons to doubt veracity and accuracy."¹⁰⁰

In forty-eight cases in the study (eleven percent of the actual malice cases), media defendants were accused of using an unreliable source. Plaintiffs won thirty-five percent of these cases. In nearly fifty-three percent of the cases won by plaintiffs, the media had not verified the source's information. For example, in *Stevens v. Sun Publishing*,¹⁰¹ a newspaper implied that a state senator was "manipulated by his con man brother."¹⁰² The reporter knew that his source had an

95. *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002-03, 9 Media L. Rep. (BNA) 1179, 1180-81 (S.D.N.Y. 1983). See also SMOLLA, LAW OF DEFAMATION, *supra* note 17, § 3.19[1] (explaining that objective reasons to doubt a source's credibility may be used to prove a reporter's subjective doubt as to the credibility of that source); Bloom, *supra* note 17, at 279 (arguing that reliance on a source with a criminal record or unsavory background can be evidence of reckless disregard).

96. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); see also Bloom, *supra* note 17, at 280 (arguing that an unreliable source may be used if the reporter is convinced of the source's veracity).

97. See, e.g., *Williams v. First Fed. Sav. Bank of Puerto Rico*, 14 Media L. Rep. (BNA) 1033, 1040 (D.V.I. 1987).

98. See, e.g., *Nash v. Keene Publishing Corp.*, 498 A.2d 348, 355, 12 Media L. Rep. (BNA) 1025, 1030 (N.H. 1985).

99. See, e.g., *Martin v. Wilson Publishing Co.*, 497 A.2d 322, 327, 12 Media L. Rep. (BNA) 1049, 1052-53 (R.I. 1985).

100. *Nash*, 498 A.2d at 355, 12 Media L. Rep. (BNA) at 1030.

101. 240 S.E.2d 812, 3 Media L. Rep. (BNA) 2025 (S.C.), *cert. denied*, 436 U.S. 945 (1978).

102. *Id.* at 814, 3 Media L. Rep. (BNA) at 2026.

"obvious bias"¹⁰³ against the plaintiff and that the story would harm the plaintiff's reputation, but "printed the article without further investigation."¹⁰⁴ The court affirmed a jury finding of actual malice and a verdict of \$50,000.¹⁰⁵

In over a third of the cases won by plaintiffs, an inference of reckless disregard was permissible because the media defendant had reason to doubt the truth of the source's information and did not verify it. For example, in *Davis v. Keystone Printing Service, Inc.*,¹⁰⁶ a newspaper reported that the plaintiff, a minister, "lured members of his religious organization into homosexual encounters, promoted illegal absences from the U.S. Navy, and encouraged large personal contributions."¹⁰⁷ Prior to publication, the plaintiff raised questions with the reporter about the credibility of the reporter's sources and produced "undeniable evidence that [one of the sources] had lied" to the reporter about a business transaction involving the plaintiff.¹⁰⁸ In reversing summary judgment for the newspaper, the court noted that "there was reason to doubt the trustworthiness" of this source,¹⁰⁹ and that the reporter failed to conduct sufficient "further investigation."¹¹⁰

The media's strongest defense against a charge of using an unreliable source was evidence of a thorough investigation of the facts. In thirty-nine percent of the cases won by the media, the courts concluded that the media had thoroughly investigated the source's information. For example, in *Pemberton v. Birmingham News Co.*,¹¹¹ the plaintiff, a state official, challenged a news headline that he said gave "the false impression that [he] was involved in an illegal or unethical scheme of buying and selling paroles."¹¹² The plaintiff attacked the reliability of the source, an ex-convict whose behavior had been inconsistent during his contacts with the reporter.¹¹³ In affirming a judgment for the media defendant, the court minimized the source's

103. *Id.* at 815, 3 Media L. Rep. (BNA) at 2026.

104. *Id.*

105. *Id.* at 813, 3 Media L. Rep. (BNA) at 2025.

106. 507 N.E.2d 1358, 14 Media L. Rep. (BNA) 1225 (Ill. App. Ct. 1987) (applying an actual malice standard to a private plaintiff case), *appeal denied*, 515 N.E.2d 1219 (Ill. 1987).

107. *Id.* at 1361, 14 Media L. Rep. (BNA) at 1225-26.

108. *Id.* at 1368, 14 Media L. Rep. (BNA) at 1231.

109. *Id.*

110. *Id.*, 14 Media L. Rep. (BNA) at 1232.

111. 482 So. 2d 257, 12 Media L. Rep. (BNA) 1465 (Ala. 1985).

112. *Id.* at 264, 12 Media L. Rep. (BNA) at 1471.

113. *Id.* at 264-65, 12 Media L. Rep. (BNA) at 1471.

credibility problems and stressed the reporter's additional investigation of the story.¹¹⁴

In addition, in over a quarter of the cases discussing charges that a reporter's source was unreliable, the courts concluded that no inference of actual malice could be drawn on this basis in part because the media had acted in accordance with accepted journalistic practices¹¹⁵ in verifying the source's information.

b. Failure to Contact an Obvious Source

In general, the media's failure to contact an obvious source, by itself, cannot establish reckless disregard.¹¹⁶ However, when a principal source's information appears "highly improbable," raising "obvious doubts about her veracity," a court may properly construe the reporter's failure to contact an obvious additional source as a "deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the principal source's] charges."¹¹⁷

Courts delve into an array of scenarios when they examine whether the media should have contacted an obvious source: in the context of a highly personal, human interest story, the failure to contact the other side of a "self-serving" account of a failed relationship;¹¹⁸ in the context of an exposé of criminal activity, the failure to test a known liar's allegations by consulting a "critical witness";¹¹⁹ and

114. *Id.* at 266-67, 12 Media L. Rep. (BNA) at 1472-73.

115. *See, e.g.,* *Diesen v. Hessburg*, 455 N.W.2d 446, 453, 17 Media L. Rep. (BNA) 1849, 1854 (Minn. 1990), *cert. denied*, 498 U.S. 1119 (1991) (crediting expert testimony that "no journalism standards were violated in the reporting or editing of the [challenged] articles"). For a separate discussion of cases involving perceived professional standards or internal news policies, see *infra* notes 159-80 and accompanying text.

116. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (1964), *cited in* SMOLLA, *LAW OF DEFAMATION*, *supra* note 17, 3.18[1]. The Court noted that the failure to use a newspaper's own files to verify statements in a paid political advertisement

· does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements

Id.; *see also* Bloom, *supra* note 17, at 283-85 (arguing that evidence of a failure to contact an obvious source is insufficient to establish reckless disregard).

117. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691-92 (1989); *see also* SMOLLA, *LAW OF DEFAMATION*, *supra* note 17, § 3.18 [1] (noting that a failure to contact an obvious source must be egregious to raise the inference that the reporter held a subjective doubt as to the source's credibility).

118. *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1362, 9 Media L. Rep. (BNA) 1257, 1264 (Colo. 1983).

119. *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002, 9 Media L. Rep. (BNA) 1179, 1180 (S.D.N.Y. 1983).

in the context of a book about state politics, the author's failure to take even "very simple" steps to verify with public authorities that a public official had been indicted.¹²⁰ As one court stated: "[A] reporter's failure to pursue the most obvious available sources of possible corroboration or refutation may clearly and convincingly evidence a reckless disregard for the truth."¹²¹

The media lost fifty-seven percent of the actual malice cases in the study in which the plaintiff charged that the media had not contacted an obvious source. In half of the cases lost by the media, the media defendant had not contacted a source who could have contradicted information provided by another source or sources. For example, in *Harte-Hanks Communications, Inc., v. Connaughton*,¹²² a newspaper quoted a source's allegation that a judicial candidate, Connaughton, had used "dirty tricks" and had promised jobs and a trip to Florida to the source and her sister in exchange for their help in discrediting an ally of Connaughton's opponent.¹²³ The court noted the possible personal motivations for the source's allegations¹²⁴ as well as "the hesitant, inaudible, and sometimes unresponsive and improbable tone" of the source's answers to the newspaper's "various leading questions."¹²⁵ In addition, although the newspaper "was aware that [the source's sister] was a key witness" to the allegations being reported, the newspaper "failed to make any effort to interview her."¹²⁶ The failure to contact an obvious source in these circumstances amounted to a "purposeful avoidance of the truth,"¹²⁷ which was sufficient to establish actual malice.

In a third of the cases lost by the media, the court concluded that a jury could infer reckless disregard on the basis of evidence that the defendant had reason to doubt the accuracy of the information and did not make a sufficient effort to investigate before publication.¹²⁸

120. *Rogers v. Doubleday & Co.*, 644 S.W.2d 833, 834, 9 Media L. Rep. (BNA) 1615, 1616 (Tex. Ct. App. 1982), *rev'd as to the publisher*, 674 S.W.2d 751, 10 Media L. Rep. (BNA) 2173 (Tex. 1984).

121. *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319, 7 Media L. Rep. (BNA) 2137, 2139-40 (Colo. 1981) (en banc).

122. 491 U.S. 657 (1989).

123. *Id.* at 660.

124. *Id.* at 673.

125. *Id.* at 691.

126. *Id.* at 692.

127. *Id.*

128. See, e.g., *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319, 7 Media L. Rep. (BNA) 2137, 2139 (Colo. 1981) (en banc) (affirming plaintiff's verdict where the reporter "admitted he had no bases for most of his erroneous statements").

The media usually prevailed when they were able to show that they conducted an adequate investigation of the story.¹²⁹

Often the source most capable of providing key information is the prospective plaintiff. In twenty-four actual malice cases in the study, the plaintiff charged that he or she had not been given an opportunity to respond to the allegations before publication. Plaintiffs won thirty-eight percent of those cases.¹³⁰ In more than half of the cases won by plaintiffs, the plaintiff possessed information that contradicted information provided by other sources.¹³¹ In most of these cases, evidence was offered that the media had reason to doubt the accuracy of the information but published anyway.¹³² However, failure to contact the plaintiff, standing alone, is unlikely to result in an unfavorable decision for the media, particularly where the defendant made efforts to reach the plaintiff.¹³³

c. Use of a Confidential Source

When a media defendant has published information in reliance on a source whose identity is not disclosed, plaintiffs often attempt to force disclosure.¹³⁴ Plaintiffs pursue this information in order to argue that the source was unreliable and hence that use of the source's information is evidence of reckless disregard,¹³⁵ or that the confidential source's information contradicted a named source's version of facts

129. See, e.g., *Doubleday v. Rogers*, 674 S.W.2d 751, 756, 10 Media L. Rep. (BNA) 2173, 2177 (Tex. 1984) (holding that despite the availability of contradictory information, a book publisher's process of substantiating an author's facts does not demonstrate reckless disregard).

130. See, e.g., *Kuhn*, 637 P.2d at 317-18, 7 Media L. Rep. (BNA) at 2138-39; *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002 n.2, 9 Media L. Rep. (BNA) 1179, 1180 n.2 (S.D.N.Y. 1983).

131. See, e.g., *Kuhn*, 637 P.2d at 319, 7 Media L. Rep. (BNA) at 2139-40 (noting that the reporter did not corroborate allegations with subjects of the story).

132. See, e.g., *Fitzgerald v. Penthouse Int'l Ltd.*, 691 F.2d 666, 671, 8 Media L. Rep. (BNA) 2340, 2343 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983) (noting that "the totality of [the source's] claims and behavior suggests that [the publisher] should have done more than it did to authenticate its source for the publication at issue").

133. See *Solar Enters. v. Polich*, 12 Media L. Rep. (BNA) 1844, 1846 (Minn. Dist. Ct. 1985).

134. See generally Robert G. Berger, *The 'No-Source' Presumption: The Harshes Remedy*, 36 AM. U. L. REV. 603 (1987) (examining the trend in libel cases of declaring a reporter's refusal to reveal a confidential source as establishing, as a matter of law, the nonexistence of that source).

135. See, e.g., *Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc.*, 623 P.2d 103, 107, 6 Media L. Rep. (BNA) 1769, 1772 (Idaho 1980) (noting the plaintiff's argument that a failure to comply with discovery prevented it from proving actual malice).

that became the basis of the published story.¹³⁶ Media defendants, in turn, resist disclosure, invoking a First Amendment-based privilege of nondisclosure¹³⁷ or state shield laws.¹³⁸ Judicial treatment of efforts to force disclosure of confidential sources in defamation cases has varied.¹³⁹ For present purposes, the important point is that the use of a confidential source is behavior that can and does come under considerable scrutiny in libel litigation.

Despite the litigation complications that can arise from the use of a confidential source, media success in cases involving this behavior is frequent. In the present study, the media won nearly sixty-five percent of the seventeen actual malice cases in which use of a confidential source was discussed. In almost all of these cases, media defendants were able to show that they thoroughly investigated the accuracy of the confidential source's information. For example, in *Clyburn v. News World Communications, Inc.*,¹⁴⁰ a newspaper published reports of the behavior of the plaintiff, a city official, at the scene of a friend's drug overdose.¹⁴¹ The newspaper relied on confidential sources, who themselves relied on informants.¹⁴² Noting the number of sources and their positions, the District Court held that reliance on the confidential sources was not indicative of actual malice.¹⁴³ The court added that all five "provided consistent information," and noted the "inherent reliability and experience" of the law enforcement officers.¹⁴⁴ The court concluded that "[t]here were no obvious reasons to doubt the veracity or the accuracy of the salient information provided by the

136. See, e.g., *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 566, 4 Media L. Rep. (BNA) 2356, 2367 (E.D. Mich. 1979) (noting the plaintiff's argument that a failure to disclose a confidential source should allow the court to assume that the source provided different information than that in the article).

137. See, e.g., *Gadsden County Times, Inc. v. Horne*, 426 So. 2d 1234, 1236 (Fla. Dist. Ct. App. 1983) (noting defendant's argument that forced disclosure of a source will restrict a reporter's ability to gather news).

138. See, e.g., the defendant's argument in *Sprague v. Walter*, 543 A.2d 1078, 1080, 15 Media L. Rep. (BNA) 1625, 1626 (Pa. Sup. Ct. 1988), *appeal dismissed*, 488 U.S. 988 (1988).

139. See generally Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 22-25 (1988) (discussing how different courts invoke *Branzburg v. Hayes*, 408 U.S. 665 (1972), for different propositions regarding existence or nonexistence of privilege).

140. 705 F. Supp. 635, 16 Media L. Rep. (BNA) 1522 (D.D.C. 1989), *aff'd*, 903 F.2d 29, 17 Media L. Rep. (BNA) 1888 (D.C. Cir. 1990).

141. *Id.* at 636, 16 Media L. Rep. (BNA) at 1523.

142. *Id.* at 642, 16 Media L. Rep. (BNA) at 1528.

143. *Id.* There were five sources, of which three were law enforcement officers, one was a federal prosecutor, and one was a city employee. *Id.*

144. *Id.*

confidential sources.”¹⁴⁵ The court of appeals stressed the credibility of the sources’ information as well.¹⁴⁶ Under these circumstances, the defendant’s reliance on confidential sources did not give rise to an inference of reckless disregard, and summary judgment was granted.¹⁴⁷

In *Schultz v. Reader’s Digest Ass’n*,¹⁴⁸ the defendant’s research efforts again dispelled any question raised by the use of confidential sources. The plaintiff sought disclosure of the identities of certain confidential sources and the information that they had given the defendant magazine.¹⁴⁹ The plaintiff’s purpose was to show that the information given by these sources was contrary to the published story and that as a result the defendant had doubted the story’s truth.¹⁵⁰ The court declined to force disclosure.¹⁵¹ The story’s *nonconfidential* sources were recognized as “clearly reputable,”¹⁵² and the reporter’s deposition showed that the confidential sources confirmed “much of the information contained in the article.”¹⁵³

In other cases, courts are unable to find sufficient verification of the information provided by a confidential source. In two thirds of the cases in this category lost by the media, defendants did not adequately verify the source’s facts. For example, in *Savitsky v. Shenandoah Valley Publishing Corp.*,¹⁵⁴ a newspaper relied on an unnamed source for a story reporting that the plaintiff, a union official campaigning for reelection, used a company helicopter on election day.¹⁵⁵ The “impact” of the particular allegation was “not lost” on the court.¹⁵⁶ In reversing summary judgment for the defendant, the court cited the reporter’s deposition testimony that “he took his unnamed informant’s word for the accuracy of the information,” and failed to confirm the story with the plaintiff “or anyone else,” despite the fact that the plaintiff had been a reliable source in the past and the story

145. *Id.* at 643, 16 Media L. Rep. (BNA) at 1529.

146. *Clyburn*, 903 F.2d at 34, 17 Media L. Rep. (BNA) at 1892, *aff’g*, 705 F. Supp. 635, 16 Media L. Rep. (BNA) 1522, 1529 (D.D.C. 1989).

147. *Clyburn*, 705 F. Supp. at 643, 16 Media L. Rep. (BNA) at 1529.

148. 468 F. Supp. 551, 4 Media L. Rep. (BNA) 2356 (E.D. Mich. 1979). In this case, the plaintiff was a private figure. *Id.* at 558-60, 4 Media L. Rep. (BNA) at 2361-62. Actual malice was implicated in a question of whether to divest the defendant’s fair comment privilege. *Id.* at 562-63, 4 Media L. Rep. (BNA) at 2362-64.

149. *Id.* at 566, 4 Media L. Rep. (BNA) at 2367.

150. *Id.*

151. *Id.* at 568, 4 Media L. Rep. (BNA) at 2368-69.

152. *Id.* at 565, 4 Media L. Rep. (BNA) at 2366.

153. *Id.* at 566, 4 Media L. Rep. (BNA) at 2367.

154. 566 A.2d 901, 17 Media L. Rep. (BNA) 1219 (Pa. Super. Ct. 1989).

155. *Id.* at 903, 17 Media L. Rep. (BNA) at 1221.

156. *Id.* at 904, 17 Media L. Rep. (BNA) at 1221.

was not "hot news."¹⁵⁷ The failure to verify the confidential source's information came close, in the court's view, to willful blindness to the story's falsity,¹⁵⁸ raising a jury question on actual malice.

d. Failure to Follow Accepted Publishing Standards

Public plaintiffs in libel actions cannot prove actual malice by simply demonstrating the media defendant's departure from "accepted publishing standards."¹⁵⁹ However, when combined with other behaviors, such departures may support a finding of reckless disregard.¹⁶⁰

As shown in this section, "accepted publishing standards" and similar phrases refer to two categories of practices discussed in the cases in this study. First, the phrase refers to journalistic conduct that is routine behavior in a particular media organization. Second, the phrase refers to journalistic conduct deemed by the court to be broadly accepted in the journalistic profession. As part of the effort to prove actual malice, plaintiffs have focused on whether a media defendant's practices in researching, writing, or editing a challenged story conformed to practices usually followed by the defendant or the profession.

Plaintiffs won forty-eight percent of the study's actual malice cases in which they argued that the defendant deviated from standard practice. For example, in *DeLoach v. Beaufort Gazette*¹⁶¹ and *Stickney v. Chester County Communications*,¹⁶² the courts discussed customary in-house practices that reporters violated. In *DeLoach*, the reporter failed to check a police station's arrest docket before writing

157. *Id.* at 903, 17 Media L. Rep. (BNA) at 1221.

158. *Id.* at 904, 17 Media L. Rep. (BNA) at 1222.

159. This phrase comes from Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967). Justice Harlan proposed that the standard of fault for public-figure libel plaintiffs should be a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Supreme Court emphasized that Justice Harlan's proposed test had never commanded a majority of the Court; rather, the proposed standard "was emphatically rejected by a majority of the Court in favor of the stricter [*Sullivan*] actual malice rule." *Id.* at 665-66.

160. *Harte-Hanks*, 491 U.S. at 668 (noting that "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry" (emphasis added)).

161. 316 S.E.2d 139, 10 Media L. Rep. (BNA) 1733 (S.C.), *cert. denied*, 469 U.S. 981 (1984).

162. 522 A.2d 66, 13 Media L. Rep. (BNA) 2192 (Pa. Super. Ct.), *appeal denied*, 533 A.2d 713 (Pa. 1987).

a story.¹⁶³ The story stated erroneously that a private citizen had been arrested and charged with assault.¹⁶⁴ Besides breaching the reporter's "usual practice" of checking the docket, the reporter breached an in-house rule of filing a report concerning his story's error.¹⁶⁵ While the court did not expressly link these lapses to its affirmance of a jury verdict for the plaintiff,¹⁶⁶ the court's mention of the in-house practices and breaches suggested their relevance to the fault inquiry.

In *Stickney*, the reporter based his account of "police brutality" only on the word of the alleged victims, with "virtually no attempt to corroborate or contradict the allegations."¹⁶⁷ The court noted that the newspaper's failure to investigate the allegations "was contrary to [the newspaper's] own policy of seeking as much corroboration as possible in articles of this nature."¹⁶⁸ While, as in *DeLoach*, the court did not expressly link this fact to its ultimate decision to affirm a verdict for the plaintiff,¹⁶⁹ the court's mention of the reporter's breach of an in-house rule was surely not gratuitous.

In *Savitsky v. Shenandoah Valley Publishing Corp.*,¹⁷⁰ in which a newspaper reported a union official's use of a company-owned helicopter,¹⁷¹ the court referred not to in-house rules but to "acceptable journalistic procedures."¹⁷² In the court's view, the article was "marked by clear departures from acceptable journalistic procedures," including "(1) the utter lack of adequate pre-publication investigation; (2) the use of wholly speculative accusatory inferences; and (3) the failure to utilize or employ effective editorial review."¹⁷³ These departures contributed to the court's holding that a jury could properly draw an inference of actual malice.¹⁷⁴

On the other hand, a media defendant's own showing that its reporters and editors had *followed* journalistic standards can contribute to decisions favorable for the media. For example, in *Diesen v. Hess-*

163. *DeLoach*, 316 S.E.2d at 141, 10 Media L. Rep. (BNA) at 1734.

164. *Id.*, 10 Media L. Rep. (BNA) at 1733.

165. *Id.*, 10 Media L. Rep. (BNA) at 1734.

166. *Id.* at 142, 10 Media L. Rep. (BNA) at 1734.

167. *Stickney*, 522 A.2d at 68, 13 Media L. Rep. (BNA) at 2193.

168. *Id.*, 13 Media L. Rep. (BNA) at 2194.

169. *Id.* at 69-70, 13 Media L. Rep. (BNA) at 2194-95; see *DeLoach*, 316 S.E.2d at 142, 10 Media L. Rep. (BNA) at 1734.

170. 566 A.2d 901, 17 Media L. Rep. (BNA) 1219 (Pa. Super. Ct. 1989).

171. *Id.* at 902, 17 Media L. Rep. (BNA) at 1220.

172. *Id.* at 904, 17 Media L. Rep. (BNA) at 1222 (citing *Frisk v. News Co.*, 523 A.2d 347, 351, 13 Media L. Rep. (BNA) 1835, 1838 (Pa. Super. Ct. 1986)).

173. *Id.*

174. *Id.*

burg,¹⁷⁵ a reporter aggressively gathered information for a story charging a local prosecutor with malfeasance in domestic violence cases.¹⁷⁶ The plaintiff claimed that the reporter and his editor omitted pertinent information and wrote the story in a way that defamed the plaintiff.¹⁷⁷ In reversing an appellate decision to reinstate a verdict for the plaintiff,¹⁷⁸ the court relied on the testimony of a journalism professor who said that the reporting techniques used by the reporter were "a textbook model of how investigative reporting should be done."¹⁷⁹ The court also concluded that the newspaper editors' refusal to meet with the plaintiff was "in accordance with standard journalism policy."¹⁸⁰

e. Repeating False Information

The media's republication of false information after being informed that the information is false can support a finding of actual malice.¹⁸¹ Plaintiffs won forty-one percent of the study's actual malice cases in which media defendants were charged with repeating false information in subsequent stories.¹⁸² In a third of the cases won by plaintiffs, the courts concluded that the media's republication was evidence that the media knowingly published false information.¹⁸³ In a quarter of the cases won by plaintiffs, the media did not correct or

175. 455 N.W.2d 446, 17 Media L. Rep. (BNA) 1849 (Minn. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991).

176. *Id.* at 453, 17 Media L. Rep. (BNA) at 1854.

177. *Id.*

178. *Id.* at 447, 17 Media L. Rep. (BNA) at 1849.

179. *Id.* at 453, 17 Media L. Rep. (BNA) at 1854.

180. *Id.* *Diesen* is one of the few cases in the study in which a court specifically cited an expert witness's testimony on standard journalistic practices. In less than one percent of the actual malice cases in the study did courts cite the testimony of an expert witness regarding journalistic performance. Despite the frequency of judicial references to standard or accepted journalistic practices, how courts arrive at their notions of standard practices in cases not involving internal rules or expert testimony about professional practices remains mysterious. Judges may simply be offering what they take to be common-sense observations. *See, e.g., Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122, 10 Media L. Rep. (BNA) 1809, 1818 (N.D. Cal. 1984) (suggesting that "responsible journalism" requires presenting a "balanced, neutral picture of th[e] particular controversy").

181. *See, e.g., Good Gov't Group of Seal Beach, Inc. v. Superior Court*, 586 P.2d 572, 579, 4 Media L. Rep. (BNA) 2082, 2088 (Cal. 1978), *cert. denied*, 441 U.S. 961 (1979); *Nevada Indep. Broadcasting Corp. v. Allen*, 664 P.2d 337, 345, 9 Media L. Rep. (BNA) 1769, 1775 (Nev. 1983).

182. *See, e.g., Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 13 Media L. Rep. (BNA) 2438 (5th Cir. 1987); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 13 Media L. Rep. (BNA) 1282 (Ariz. 1986).

183. *See, e.g., Zerangue*, 814 F.2d at 1072, 13 Media L. Rep. (BNA) at 2443; *Dombey*, 724 P.2d at 576, 13 Media L. Rep. (BNA) at 1294.

retract a statement after receiving information raising the possibility that the statement was false and warranting further investigation.¹⁸⁴

In cases involving republished information, courts usually examine all the circumstances in which the media defendant learned that the story initially published could be false. For example, in *Dombey v. Phoenix Newspapers, Inc.*,¹⁸⁵ a newspaper published stories charging that the plaintiff, an insurance agent, had benefitted from cronyism in the awarding of county contracts.¹⁸⁶ The agent provided a wealth of information to the newspaper, including "an extensive demand for correction and retraction,"¹⁸⁷ which detailed "at great length each and every supposed factual error" and was supported by public records.¹⁸⁸ The court catalogued the agent's unsuccessful efforts to obtain a sufficient retraction,¹⁸⁹ and noted that subsequent stories included false information.¹⁹⁰ The newspaper argued that it had merely been negligent in not keeping its own files timely with the information and denials provided by the agent, and in not studying the agent's lengthy submission of records.¹⁹¹ Noting that "[g]eneral unspecific demands for retraction are, of course, of no weight," the court found that the newspaper's republication of the false information under these circumstances could support an inference of actual malice.¹⁹²

In *Zerangue v. TSP Newspapers, Inc.*,¹⁹³ a newspaper retracted a story that had misstated the reason two former law enforcement officers lost their jobs.¹⁹⁴ The month following the retraction, however, the newspaper made the same error, publishing that the former officers had been convicted of felonies when in fact they had been convicted of misdemeanors.¹⁹⁵ The reporter who wrote the second story

184. See, e.g., *Nevada Indep. Broadcasting Corp. v. Allen*, 664 P.2d 337, 345, 9 Media L. Rep. (BNA) 1769, 1774-75 (Nev. 1983) (finding that publisher's "correction" could be taken as a "republishing"); *Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 36, 5 Media L. Rep. (BNA) 1113, 1116 (Cal. Ct. App.), cert. denied, 444 U.S. 984 (1979).

185. 724 P.2d 562, 13 Media L. Rep. (BNA) 1282 (Ariz. 1986).

186. *Id.* at 563-65, 13 Media L. Rep. (BNA) at 1283-85.

187. *Id.* at 565, 13 Media L. Rep. (BNA) at 1285.

188. *Id.* at 575, 13 Media L. Rep. (BNA) at 1293.

189. *Id.* at 574-75, 13 Media L. Rep. (BNA) at 1293-94. The court noted that "a 'retraction' was published, but it contained further false statements about Dombey." *Id.* at 574, 13 Media L. Rep. (BNA) at 1293.

190. *Id.* at 575, 13 Media L. Rep. (BNA) at 1293-94.

191. *Id.* at 575-76, 13 Media L. Rep. (BNA) at 1293-94.

192. *Id.*, 13 Media L. Rep. (BNA) at 1293-95.

193. 814 F.2d 1066, 13 Media L. Rep. (BNA) 2438 (5th Cir. 1987).

194. *Id.* at 1068, 13 Media L. Rep. (BNA) at 2440.

195. *Id.* at 1068-69, 13 Media L. Rep. (BNA) at 2439-40. In discussing the issue of "substantial truth," the court noted that the newspaper's stories "could be viewed as converting a foolish and irresponsible betrayal of the public trust into a rapacious and calculated one." *Id.* at 1073, 13 Media L. Rep. (BNA) at 2444.

said that she based the statements on the original story in the paper's "computer files," that her "computer search did not turn up the [subsequent] retraction and that she was not otherwise aware of the retraction."¹⁹⁶ Both editors who might have edited the second story were aware of the original story's error and the retraction but they said that "neither noticed the error"¹⁹⁷ in the second story. Another retraction followed the second story.¹⁹⁸ Nevertheless, the court held that a jury could find actual malice in the second story's publication.¹⁹⁹ The court stated: "[O]nce the publisher knows that the story is erroneous . . . the argument for weighting the scales on the side of first amendment interests becomes less compelling. The [defendant newspaper] could have adopted a policy of disseminating retractions widely or with certainty among newsroom staff, and of revising its computer files after each retraction."²⁰⁰

f. Not Including Pertinent Information

As long as a reporter or editor believes the published facts to be true, the act of selecting disparaging facts rather than other facts cannot establish reckless disregard.²⁰¹ However, when a defendant has credible information casting doubt on the truth of facts selected for inclusion in the story, a decision not to include pertinent information can be evidence of reckless disregard.²⁰²

For example, in *Green v. Northern Publishing Co.*,²⁰³ a newspaper published an editorial implying that a physician had been partially responsible for the death of a disturbed inmate.²⁰⁴ In reversing summary judgment for the newspaper, the court concluded that a jury could find that the newspaper had acted in reckless disregard of the

196. *Id.* at 1069, 13 Media L. Rep. (BNA) at 2440.

197. *Id.*

198. *Id.*

199. *Id.* at 1074, 13 Media L. Rep. (BNA) at 2442-43.

200. *Id.* at 1072, 13 Media L. Rep. (BNA) at 2443.

201. See, e.g., *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 619, 11 Media L. Rep. (BNA) 1065, 1072 (Cal. 1984), *cert. denied*, 478 U.S. 1009 (1989); see also SMOLLA, *LAW OF DEFAMATION*, *supra* note 17, § 3.20[2] (maintaining that "lack of balance is not synonymous with a lack of balance or neutrality in the gathering, reporting or editing of news").

202. See, e.g., *Healy v. New England Newspapers, Inc.*, 555 A.2d 321, 328, 16 Media L. Rep. (BNA) 1753, 1758 (R.I.), *cert. denied*, 493 U.S. 814 (1989); see also SANFORD, *supra* note 17, § 8.4.6.1 (describing the role of denials and contradictions in achieving balanced reporting).

203. 655 P.2d 736, 8 Media L. Rep. (BNA) 2515 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983).

204. *Id.* at 739, 8 Media L. Rep. (BNA) at 2517.

truth.²⁰⁵ The newspaper “knew of” but did not mention “substantial evidence” showing that the coroner’s report and inquest had found that the inmate’s death was of natural causes.²⁰⁶

Plaintiffs won forty percent of the actual malice cases in the study in which the plaintiff charged that the media had not included pertinent information in the story.²⁰⁷ In some cases, courts held that it could also be found that the defendant was predisposed to publish information damaging to the plaintiff.²⁰⁸ In nearly a third of the cases won by plaintiffs, the courts found that the defendant wrote the challenged statement in a manner that could cause readers to infer false, defamatory facts about the plaintiff. For example, in *Healy v. New England Newspapers, Inc.*,²⁰⁹ a newspaper published two articles about the collapse and death of a YMCA member during a demonstration near a building where a YMCA board meeting was taking place.²¹⁰ A local physician who was presiding at the board meeting heard about the collapse and asked if he could help, but other board officials informed him that the stricken man was already receiving help or would receive it momentarily.²¹¹ The newspaper’s second article stated that the family of the deceased man was angry that the doctor had not assisted the man when he collapsed, falsely implying that the doctor “refused to help a person in need of medical attention.”²¹² On affirming a jury’s award of punitive damages to the doctor, the court noted that “[t]he ‘defamation’ at issue here really consists of what was left unprinted as well as what was actually printed.”²¹³ Noting too that “information was available to [the reporter] prior to publishing the . . . article to clarify any confusion about what plaintiff was asked or told and how he responded,” the court held that this and other evidence could support a finding of actual malice.²¹⁴

205. *Id.* at 744, 8 Media L. Rep. (BNA) at 2521.

206. *Id.* at 742, 8 Media L. Rep. (BNA) at 2520.

207. *See, e.g.,* Macon Tel. Publishing Co. v. Elliott, 302 S.E.2d 692, 695, 9 Media L. Rep. (BNA) 2252, 2253 (Ga. Ct. App. 1983), *cert. denied*, 466 U.S. 971 (1984) (affirming trial court award of damages for private plaintiff arguing actual malice).

208. *See, e.g.,* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 683-84 (1989); Warford v. Lexington Herald-Leader, 789 S.W.2d 758, 772, 17 Media L. Rep. (BNA) 1785, 1796 (Ky. 1990), *cert. denied*, 498 U.S. 1047 (1991).

209. 555 A.2d 321, 16 Media L. Rep. (BNA) 1753 (R.I.), *cert. denied*, 493 U.S. 814 (1989).

210. *Id.* at 322-24, 16 Media L. Rep. (BNA) at 1754-56.

211. *Id.* at 322-23, 16 Media L. Rep. (BNA) at 1754-55.

212. *Id.* at 327, 16 Media L. Rep. (BNA) at 1758.

213. *Id.* at 326, 16 Media L. Rep. (BNA) at 1758.

214. *Id.* at 327, 16 Media L. Rep. (BNA) at 1758.

g. Failure of the Media to Correct or Retract

Authorities are mixed on the significance of a refusal to correct or retract information challenged as false by a prospective plaintiff.²¹⁵ In *New York Times Co. v. Sullivan*,²¹⁶ the Supreme Court appeared skeptical of the use of such proof in a libel action.²¹⁷ The Court noted that, "[w]hether or not a failure to retract may ever constitute . . . evidence [of actual malice]," the *Times's* decision not to retract on the demand of the plaintiff could not be such evidence in the circumstances of that case.²¹⁸ The *Restatement (Second) of Torts* suggests in a comment that "[u]nder certain circumstances evidence [of a refusal to retract after the statement has been demonstrated to be both false and defamatory] might be relevant in showing recklessness at the time the statement was published."²¹⁹ However, the *Restatement* does not explain whether the plaintiff in fact must "demonstrate[]" that the statement was false or whether it is sufficient for the plaintiff merely to raise doubts in the mind of the defendant. Nor does the *Restatement* explain why it uses the tentative phrase "might be relevant."²²⁰ The problem with such evidence appears to be that actual malice refers to state of mind at the time of publication, not afterwards.²²¹

Matching the *Restatement's* tentativeness on the issue, the cases go in several directions. In some jurisdictions, a refusal to correct or retract a story can be relevant to actual malice, but standing alone it is not dispositive.²²² In others, "failure to retract has no bearing on the issue of malice."²²³ Indeed, some courts state that failure to retract "provides some evidence that [the publisher] reasonably believed [the plaintiff] had not been defamed."²²⁴

Other cases examine the significance of the media's *willingness* to retract. In a case in which the media defendant promptly retracted a

215. See generally Bloom, *supra* note 17, at 327-29 (analyzing the effect of circumstances surrounding a retraction).

216. 376 U.S. 254 (1964).

217. *Id.* at 286.

218. *Id.* at 286-87 (emphasis added).

219. RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (1977).

220. *Id.*

221. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498 (1984) (stating that the relevant time period for actual malice inquiry is "at the time of publication"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (same).

222. See, e.g., *Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950, 9 Media L. Rep. (BNA) 1857, 1861 (5th Cir. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (1977)).

223. *Pelzer v. Minneapolis Tribune*, 7 Media L. Rep. (BNA) 2507, 2509 (Minn. Dist. Ct. 1981).

224. *Connelly v. Northwest Publications, Inc.*, 448 N.W.2d 901, 905, 17 Media L. Rep. (BNA) 1204, 1207 (Minn. Ct. App. 1989) (citing *Sullivan*, 376 U.S. at 286-87)).

challenged statement, the court found that "it is significant and tends to negate any inference of actual malice on the part of the [newspaper] that it published a retraction of the indisputably inaccurate portions of the [challenged] article in the next day's edition."²²⁵ Other courts, however, accord little significance to a defendant's prompt retraction.²²⁶

Plaintiffs won half of the actual malice cases in the study in which the media failed to retract or correct a statement after being informed that it contained errors. In a number of these cases, the defendant discovered that the information was false, but failed to correct the errors and failed to prevent republication. For example, in *Rinaldi v. Viking Penguin, Inc.*,²²⁷ the defendant published a book linking the plaintiff to organized crime.²²⁸ The plaintiff insisted on a retraction and deletion of false material from unissued copies or future printings.²²⁹ The defendant acknowledged that some of the information was false and planned to make corrections in subsequent printings.²³⁰ However, when the book was reprinted as a paperback, the false information remained intact.²³¹ The court found that the defendant's failure to ensure the correction of concededly false facts was sufficient evidence of actual malice to warrant denial of summary judgment.²³²

An insufficient retraction can also be probative of actual malice, especially if the retraction makes little effort to distance itself from the original defamation. In *Nevada Independent Broadcasting Corp. v. Allen*,²³³ the moderator of a televised political program accused the plaintiff, a gubernatorial candidate, of passing a bad check.²³⁴ During a commercial break, the candidate's representative demanded an apology.²³⁵ When the program resumed, the moderator acknowledged the demand but did not comply.²³⁶ The candidate then made a

225. *Hoffman v. Washington Post*, 433 F. Supp. 600, 605, 3 Media L. Rep. (BNA) 1143, 1146 (D.D.C. 1977), *aff'd*, 578 F.2d 442, 3 Media L. Rep. (BNA) 2546 (D.C. Cir. 1978).

226. *See, e.g., Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071, 13 Media L. Rep. (BNA) 2438, 2442 (5th Cir. 1987) (crediting retraction of first erroneous story but not second); *DeLoach v. Beaufort Gazette*, 316 S.E.2d 139, 141, 10 Media L. Rep. (BNA) 1733 (S.C.), *cert. denied*, 469 U.S. 981 (1984) (recounting retraction in facts but not discussing it in legal analysis).

227. 420 N.E.2d 377, 7 Media L. Rep. (BNA) 1202 (N.Y. 1981).

228. *Id.* at 378, 7 Media L. Rep. (BNA) at 1203.

229. *Id.* at 379, 7 Media L. Rep. (BNA) at 1203.

230. *Id.*

231. *Id.* at 379-80, 7 Media L. Rep. (BNA) at 1204.

232. *Id.* at 383, 7 Media L. Rep. (BNA) at 1207.

233. 664 P.2d 337, 9 Media L. Rep. (BNA) 1769 (Nev. 1983).

234. *Id.* at 340, 9 Media L. Rep. (BNA) at 1771.

235. *Id.* at 341, 9 Media L. Rep. (BNA) at 1771.

236. *Id.*

written demand for a retraction.²³⁷ After the station and the candidate were unable to agree on an appropriate retraction, the station issued its own version.²³⁸ The court found that the retraction was tantamount to a republication of the original defamation and that the republication, following notice of falsity, was evidence of reckless disregard.²³⁹

h: Failure of the Media to Act on False Information

This section covers a number of behaviors separately listed on Table 2, all relating to publishing information in the face of doubts about accuracy.

In seventy-four cases (17.6% of the actual malice cases), plaintiffs offered proof that the media had reason to doubt the accuracy of the information and yet failed to verify it.²⁴⁰ Plaintiffs won favorable rulings in two-thirds of these cases.²⁴¹

In fifty-two cases (12.4% of the actual malice cases), plaintiffs attempted to prove that the media failed to correct information after the information was challenged as false.²⁴² Plaintiffs won forty-four percent of these cases.²⁴³ In some of these cases, the plaintiff told the

237. *Id.*

238. *Id.*

239. *Id.* at 345, 9 Media L. Rep. (BNA) at 1774-75 (citing RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (1977)).

240. *See, e.g.,* Sharon v. Time, Inc., 599 F. Supp. 538, 575-76, 11 Media L. Rep. (BNA) 1153, 1182-83 (S.D.N.Y. 1984) (discussing "equivocal evidence" underlying published allegation); Nash v. Keene Publishing Corp., 498 A.2d 348, 355, 12 Media L. Rep. (BNA) 1025, 1030 (N.H. 1985) (Souter, J.) (finding evidence of "a failure to verify in the face of affirmative evidence of falsehood and inaccuracy"); Herron v. KING Broadcasting Co., 776 P.2d 98, 106, 17 Media L. Rep. (BNA) 1289, 1295 (Wash. 1989) (en banc) (discussing evidence that a reporter's "investigation actually uncovered facts which directly rebutted his false statement").

241. *See, e.g.,* Sharon, 599 F. Supp. at 588, 11 Media L. Rep. (BNA) at 1192; Warford v. Lexington Herald-Leader, 789 S.W.2d 758, 17 Media L. Rep. (BNA) 1785 (Ky. 1990); Nash, 498 A.2d at 355, 12 Media L. Rep. (BNA) at 1030; Herron, 776 P.2d at 107, 17 Media L. Rep. (BNA) at 1296.

242. This category combines two subcategories of cases listed on Table 1: those in which the media failed to correct information after being informed the information was false, and those in which the media failed to act on information that the story contained false information prior to publication. In two cases, Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 14 Media L. Rep. (BNA) 1601 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988), and Synanon Found., Inc. v. Time, Inc., 5 Media L. Rep. (BNA) 1924 (Cal. Super. Ct. 1979), both behaviors were at issue.

243. *See, e.g.,* Synanon Found., 5 Media L. Rep. 1924; Braig v. Field Communications, 456 A.2d 1366, 9 Media L. Rep. (BNA) 1057 (Pa. Super. Ct. 1983), *cert. denied*, 466 U.S. 970 (1984).

media defendant before publication that the information contained errors,²⁴⁴ and the plaintiff sometimes offered proof of falsity.²⁴⁵

Plaintiffs also prevailed in a number of cases in which they informed the media after publication that the information was false, and yet the media published the information again.²⁴⁶ Usually courts found that an inference of recklessness was permissible in connection with the republication, rather than the original story. For example, in *Braig v. Field Communications*,²⁴⁷ a television station broadcast a public affairs program in which an assistant district attorney criticized a judge for his handling of a police brutality case.²⁴⁸ After the initial broadcast, the judge contacted the station's general manager to complain that the statements were false attacks on his integrity.²⁴⁹ After the station manager reviewed a tape of the program, going "over and over the tape," the program was rebroadcast without any changes.²⁵⁰ In reversing summary judgment for the station, the court found that a jury could infer that the defendant entertained "serious doubts" about the truth of the rebroadcast because of the manager's repeated viewing of the tape and his awareness of the judge's claim of falsity.²⁵¹

Media defendants prevailed when they showed that they had no reason to believe the information to be false. In a number of cases, the courts found that the media had no reason to doubt the accuracy of the information because it had been provided by a reliable source. In *Speer v. Ottaway Newspapers, Inc.*,²⁵² a newspaper published an editorial charging the plaintiff with excessive force in the arrest of one of the newspaper's reporters.²⁵³ The plaintiff charged that the reporter's version of the facts was false and that the newspaper's reli-

244. See, e.g., *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 1371, 2 Media L. Rep. (BNA) 1801, 1806 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616, 6 Media L. Rep. (BNA) 1573 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Davis v. Keystone Printing Serv., Inc.*, 507 N.E.2d 1358, 1368, 14 Media L. Rep. (BNA) 1225, 1231 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 1219 (Ill. 1987) (applying actual malice standard in private plaintiff case); *Warford*, 789 S.W.2d at 772, 17 Media L. Rep. (BNA) at 1796.

245. See, e.g., *Davis*, 507 N.E.2d at 1368, 14 Media L. Rep. (BNA) at 1231.

246. See, e.g., *Holter v. WLCY TV, Inc.*, 366 So. 2d 445, 448-49, 4 Media L. Rep. (BNA) 2281, 2284 (Fla. Dist. Ct. App. 1978), *cert. denied*, 373 So. 2d 462 (Fla. 1979).

247. 456 A.2d 1366, 9 Media L. Rep. (BNA) 1057 (Pa. Super. Ct. 1983), *cert. denied*, 466 U.S. 970 (1984).

248. *Id.* at 1369, 9 Media L. Rep. (BNA) at 1058.

249. *Id.* at 1376, 9 Media L. Rep. (BNA) at 1064.

250. *Id.*

251. *Id.*

252. 828 F.2d 475, 14 Media L. Rep. (BNA) 1601 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988).

253. *Id.* at 476, 14 Media L. Rep. (BNA) at 1602.

ance on the reporter was evidence of reckless disregard.²⁵⁴ In affirming a judgment in favor of the defendant, the court concluded that the defendant was unaware that the information was false and had no reason to doubt the information because it was "not inherently improbable" and because the reporter was believed to be honest.²⁵⁵

i. Failure to Investigate Information Adequately

One of the most frequent claims in libel litigation is the broad charge that the media defendant's investigation of facts was inadequate.²⁵⁶ However, proof of inadequate investigation is not, by itself, sufficient to establish actual malice.²⁵⁷ As the preceding sections have demonstrated, plaintiffs can meet the actual malice test by showing inadequate investigation in conjunction with other facts, such as reliance on a suspect source,²⁵⁸ or awareness of contradictory information.²⁵⁹ In thirty-six percent of the cases won by plaintiffs in which the media had not adequately investigated information, the media also had not verified a source's information.²⁶⁰ In most of these cases, the courts determined that the source was unreliable, giving the media reason to doubt the accuracy of the information.²⁶¹

In half of the cases won by plaintiffs in which the courts found inadequate investigations, the courts also found that the media had doubts about the truth.²⁶² In twenty-seven percent of these cases, the

254. *Id.* at 478, 14 Media L. Rep. (BNA) at 1603.

255. *Id.*

256. In nearly a quarter of the actual malice cases in the study, courts addressed the issue of whether the media had adequately investigated the facts before publishing. *See, e.g., Nash v. Keene Publishing Corp.*, 498 A.2d 348, 355, 12 Media L. Rep. (BNA) 1025, 1030 (N.H. 1985).

257. *See St. Amant v. Thompson*, 390 U.S. 727, 731, 733 (1968).

258. *See supra* notes 95-115 and accompanying text.

259. *See supra* notes 240-55 and accompanying text.

260. *See, e.g., Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 772, 17 Media L. Rep. (BNA) 1785, 1796 (Ky. 1990) (finding that a failure to investigate information before publishing becomes "probative of malice when viewed cumulatively with other the [sic] evidence," including circumstances surrounding failure to verify a source's claims in the face of plaintiff's denials).

261. *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691-92 (1989) (finding that the defendant's "inaction," in the face of a clearly suspect source, was tantamount to a "purposeful avoidance of the truth").

262. *See, e.g., Holter v. WLCY TV, Inc.*, 366 So. 2d 443, 453, 4 Media L. Rep. (BNA) 2281, 2288 (Fla. Dist. Ct. App. 1978) (finding that reporter thought there was a possible "mix-up" in the facts of an unresearched story but rebroadcast the story anyway), *cert. denied*, 373 So. 2d 462 (Fla. 1979).

courts concluded that the media had reason to believe the information was false before publication.²⁶³

When the media prevailed in cases involving the adequacy of the investigation, courts often concluded that the media followed standard practice in investigating the information.²⁶⁴ Moreover, a thorough investigation will protect the media even if errors are made in the process. For example, in *Fletcher v. San Jose Mercury News*,²⁶⁵ the court was troubled by evidence that a reporter had altered a key quote used in the story.²⁶⁶ However, the court's concerns were outweighed by evidence of an otherwise thorough investigation and a "sincere attempt" to report information about a public official's questionable ethics.²⁶⁷

In *Peeler v. Spartanburg Herald-Journal*,²⁶⁸ a newspaper erroneously reported that a school board trustee had done business with the school district in violation of law.²⁶⁹ The allegation was based on the reporter's misunderstanding of information supplied by a state ethics commission.²⁷⁰ The court found that the reporter's reliance on the commission's information was reasonable and that his misreading of a state document was a technical error that could not support an inference of actual malice.²⁷¹

j. Ill Will as Evidence of Actual Malice

A journalist's ill will toward a plaintiff is not itself sufficient to support a finding of actual malice.²⁷² However, evidence of ill will can be probative of actual malice.²⁷³ As one court has said, "the appropriateness of such evidence must be determined on a case-by-case basis, bearing in mind that evidence of ill will or bad motives will support a

263. See, e.g., *Herron v. KING Broadcasting Co.*, 776 P.2d 98, 106, 17 Media L. Rep. (BNA) 1289, 1295 (Wash. 1989) (finding that inference of actual malice was possible when reporter "had no basis" for facts reported and had "actually uncovered facts which directly rebutted his false statement").

264. See *supra* notes 159-80 and accompanying text.

265. 264 Cal. Rptr. 699, 17 Media L. Rep. (BNA) 1321 (Ct. App. 1989), *cert. denied*, 498 U.S. 813 (1990).

266. *Id.* at 707, 17 Media L. Rep. (BNA) at 1328-29.

267. *Id.*

268. 15 Media L. Rep. (BNA) 1155 (D.S.C. 1988).

269. *Id.* at 1155.

270. *Id.* at 1155-56.

271. *Id.* at 1157-58.

272. See, e.g., *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989); see also *Bloom, supra* note 17, at 261 (stating that "a few courts have posited that a defendant's ill will is completely irrelevant to the issue of reckless disregard").

273. See, e.g., *Herron v. KING Broadcasting Co.*, 776 P.2d 98, 106-07, 17 Media L. Rep. (BNA) 1289, 1296 (Wash. 1989).

finding of actual malice only when combined with other, more substantial evidence of a defendant's bad faith."²⁷⁴

In twelve percent of the actual malice cases in the study, plaintiffs charged that the media defendants harbored ill will or hostility against them.²⁷⁵ Plaintiffs won twenty-four percent of these cases.²⁷⁶ In a third of these cases, the plaintiffs alleged both ill will and failure to verify.²⁷⁷ In forty-two percent of these cases, the courts found that a jury could conclude that the journalist had published despite doubts about accuracy. For example, in *Herron v. King Broadcasting Co.*,²⁷⁸ a news report inflated the amount of campaign funds a county prosecutor had received from bail bonding companies.²⁷⁹ In reversing summary judgment, the court found that a jury could infer actual malice from the reporter's knowledge of information directly rebutting the story.²⁸⁰ The court added that evidence of the reporter's hostility could "bolster[]" the inference.²⁸¹

Another risky combination can be the use of a source known to be hostile toward the plaintiff, and the failure to verify the source's information.²⁸² In *Sible v. Lee Enterprises*,²⁸³ a Montana newspaper published information from a source known to be both hostile to the plaintiff and "nervous" about the accuracy of his information.²⁸⁴ In reversing a jury verdict for the newspaper based on erroneous instructions, the court suggested that the defendant had chosen to "close its eyes" to the need for further investigation.²⁸⁵

The media won more than seventy percent of the actual malice cases in the study in which plaintiffs charged that the media had relied on a hostile source.²⁸⁶ In most of these cases, defendants were able to

274. *Tavoulareas v. Piro*, 817 F.2d 762, 795, 13 Media L. Rep. (BNA) 2377, 2403 (D.C. Cir.) (en banc), cert. denied, 484 U.S. 870 (1987).

275. See, e.g., *Saenz v. Playboy Enters.*, 653 F. Supp. 552, 571, 13 Media L. Rep. (BNA) 1977, 1991 (N.D. Ill. 1987), aff'd, 841 F.2d 1309, 15 Media L. Rep. (BNA) 1043, 1051 (7th Cir. 1988).

276. See, e.g., *Herron*, 776 P.2d at 107, 17 Media L. Rep. (BNA) at 1296.

277. See, e.g., *Sharon v. Time, Inc.*, 599 F. Supp. 538, 583-84, 11 Media L. Rep. (BNA) 1153, 1189 (S.D.N.Y. 1984).

278. 776 P.2d 98, 17 Media L. Rep. (BNA) 1289 (Wash. 1989).

279. *Id.* at 100, 17 Media L. Rep. (BNA) at 1290.

280. *Id.* at 105-06, 17 Media L. Rep. (BNA) at 1295.

281. *Id.* at 106-07, 17 Media L. Rep. (BNA) at 1296.

282. See Bloom, *supra* note 17, at 280-81.

283. 729 P.2d 1271, 13 Media L. Rep. (BNA) 1738 (Mont. 1986), cert. denied, 483 U.S. 1011 (1987).

284. *Id.* at 1272, 13 Media L. Rep. (BNA) at 1739.

285. *Id.* at 1274, 13 Media L. Rep. (BNA) at 1740.

286. See, e.g., *Janklow v. Viking Press*, 459 N.W.2d 415, 421-22, 17 Media L. Rep. (BNA) 2220, 2224-25 (S.D. 1990).

convince the court that they had thoroughly investigated the source's information before publication.²⁸⁷ In all of the cases lost by the media, the courts found that defendants had not adequately investigated a source's information.²⁸⁸

C. Conclusion

The data show clearly that courts are engaged in evaluating each step of the journalistic process. The relevance of this conduct is a natural product of *New York Times Co. v. Sullivan*,²⁸⁹ although it is difficult to believe that the *Sullivan* Court ever imagined the scope of behaviors that would come under scrutiny in applications of the actual malice test.

The data show that a defendant's failure to verify the accuracy of suspect information or to verify the information provided by a suspect source are the two behaviors most likely to result in rulings unfavorable to the media. The media defendant's best defense is evidence of an adequate investigation of the challenged facts. However, the data disclose more than these broad observations about wins and losses. They reveal patterns of specific conduct—such as the use of an unreliable source for allegations of serious misconduct combined with a failure to verify that source's facts with available independent sources²⁹⁰—that over time become identified as likely indicators of actual malice, and thus as behavioral patterns to be avoided.

Having surveyed the patterns of behavior at issue in libel decisions, we now examine how courts discuss journalistic performance and send signals to the profession in individual cases. Courts employ several modes of decision making when evaluating performance and each can be a vehicle for stating or implying a standard of journalism.

II. CREATING JOURNALISTIC STANDARDS

In the second phase of the study, our interests were the nature of judicial statements in public-plaintiff libel opinions, whether those statements emerged from a uniform pattern of analysis or several different patterns, whether different patterns of analysis reflected differ-

287. See, e.g., *Tavoulareas v. Piro*, 817 F.2d 762, 797, 13 Media L. Rep. (BNA) 2377, 2405 (D.C. Cir.) (en banc), cert. denied, 484 U.S. 870 (1987); *Janklow*, 459 N.W.2d at 421-22, 17 Media L. Rep. (BNA) at 2224-25.

288. See, e.g., *Stevens v. Sun Publishing Co.*, 240 S.E.2d 812, 815, 3 Media L. Rep. (BNA) 2025, 2026 (S.C.), cert. denied, 436 U.S. 945 (1978).

289. 376 U.S. 254 (1964).

290. See *supra* notes 122-27 and accompanying text.

ent underlying values or concerns, and whether different press behaviors affected judicial analysis in different ways.

To facilitate this examination, we placed the journalistic behaviors identified in Part I into three categories that reflect key aspects of the journalistic process: research, writing, and editing. Within each of these categories, we identified cases in which that particular journalistic behavior clearly was a central concern to the court. We used the analyses of behaviors discussed in Part I to help identify cases containing behaviors that were important to courts. In addition, we focused only on cases from state supreme courts and federal courts.²⁹¹ Ultimately we analyzed thirty-two cases in the research category, twenty-four in the writing category, and twenty-one in the editing category.

Because the cases were not selected randomly, and because they represent a small percentage of cases in the study overall, we cannot say whether they are representative of all the cases in each category. Thus, the models of decision making identified in Part II may or may not be applicable to all libel cases involving research, writing, or editing. Nonetheless, our examination of this subgroup of cases provides a sense of the modes of judicial analysis of press behavior, as well as a sense of whether those analytic modes were producing standards of behavior, and, if so, what sorts of standards they produced. As the sections below explain, we identified three analytic modes as present in all three categories of behavior.

A. *Modes of Standards-Creation*

Unlike a regulatory agency, courts do not announce regulations and publish them in the Federal Register. Instead, norms of journalistic behavior emerge from several different modes of decision-making. Here we summarize each. In Sections II-B,²⁹² II-C,²⁹³ and II-D,²⁹⁴ we analyze the workings of each type of decision-making and its implications through discussions of illustrative cases.

1. Discussion of Press Behavior as Egregious, with the Court Providing Both Factual and Legal Analysis, Producing a Restrictive Norm

Decisions utilizing this mode of analysis are marked by a strong tone of judicial disapproval of the press behavior at issue. Another

291. We omitted lower state court opinions so that the number of cases studied would be manageable.

292. See *infra* notes 311-96 and accompanying text.

293. See *infra* notes 397-430 and accompanying text.

294. See *infra* notes 431-99 and accompanying text.

common feature is the tripartite structure of decisions: first, a lengthy review of libel doctrine, beginning with *Sullivan*; second, a detailed review of specific facts, often quite damning (sometimes these two parts are reversed in order); and third, the articulation or strong implication of a behavioral norm that has been violated, and a linkage of that norm to the *Sullivan* rules.

In only a small number of the cases examined did courts utilize this mode of analysis. Of thirty-two actual malice cases that focused on journalistic research, only four were classified as treating the research behavior as egregious.²⁹⁵ Of twenty-four "writing" decisions in actual malice cases, only three were classified as treating the writing behavior as egregious.²⁹⁶ Of twenty-one "editing" decisions in actual malice cases, only three were classified as treating editing behavior as egregious;²⁹⁷ one of these was reversed on appeal.²⁹⁸

2. Fact-Oriented Discussion of Behavior, Implying that Certain Behavior is Highly Questionable, Thus Producing an Implied Restrictive Norm

Decisions utilizing this second mode of analysis are marked by a less certain and less disapproving tone. Typically, these decisions involve a motion for summary judgment,²⁹⁹ requiring only that the court determine whether the evidence is such that the case may proceed; the less judgmental tone accords with the procedural posture. The decisions also contain fewer references to case law than the decisions utilizing the first mode of analysis; factual discussions are paramount.

295. See *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 2 Media L. Rep. (BNA) 1801 (N.D. Cal. 1977), *aff'd* 623 F.2d 616, 6 Media L. Rep. (BNA) 1573 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 9 Media L. Rep. (BNA) 1257 (Colo. 1983); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 7 Media L. Rep. (BNA) 2137 (Colo. 1981) (en banc); *Nash v. Keene Publishing Corp.* 498 A.2d 348, 12 Media L. Rep. (BNA) 1025 (N.H. 1985).

296. See *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 13 Media L. Rep. (BNA) 1282 (Ariz. 1986); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 9 Media L. Rep. (BNA) 1257 (Colo. 1983); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 7 Media L. Rep. (BNA) 2137 (Colo. 1981). Note that below we take issue with the court's treatment of the writing in *Burns*. See *infra* notes 355-72 and accompanying text.

297. See *Hunt v. Liberty Lobby*, 720 F.2d 631, 10 Media L. Rep. (BNA) 1097 (11th Cir. 1983); *Newton v. NBC, Inc.*, 677 F. Supp. 1066, 14 Media L. Rep. (BNA) 1914 (D. Nev. 1987), *rev'd*, 930 F.2d 662, 18 Media L. Rep. (BNA) 1001 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991); *Montandon v. Triangle Publications, Inc.*, 120 Cal. Rptr. 186 (Cal. Ct. App.), *cert. denied*, 423 U.S. 893 (1975).

298. See *Newton v. NBC, Inc.*, 677 F. Supp. 1066, 14 Media L. Rep. (BNA) 1914 (D. Nev. 1987), *rev'd*, 930 F.2d 662 (9th Cir. 1990), 18 Media L. Rep. (BNA) 1001, *cert. denied*, 112 S. Ct. 192 (1991).

299. Of the 18 fact-oriented decisions examined (12 research, 3 writing, and 3 editing), 13 involved motions for summary judgment (9 research, 2 writing, 2 editing).

Finally, while decisions utilizing the first mode were consistently few in number across all three behavioral groupings (research, writing, and editing), that pattern does not repeat itself in the fact-oriented groupings. Of the thirty-two "research" cases involving allegations of actual malice, twelve were classified as fact-oriented discussions,³⁰⁰ whereas of the twenty-four "writing" cases involving allegations of actual malice, only three were classified as fact-oriented,³⁰¹ and of the twenty-one "editing" cases involving allegations of actual malice, only three were classified as fact-oriented.³⁰² In the larger category—fact-oriented "research" cases—plaintiffs won twice as many cases as defendants. In the smaller categories—fact-oriented "writing" and "editing" cases—plaintiffs won in all but one case.³⁰³

3. Law-Oriented Discussion in Which Behavior is Approved, Producing a Permissive Norm

Decisions utilizing this third mode of analysis call attention to the wide scope of legal protection afforded by the actual malice privilege and emphasize the requirement that subjective fault be proven with convincing clarity. The analysis conforms to a tripartite structure: a

300. See *Reuber v. Food Chem. News*, 899 F.2d 271, 17 Media L. Rep. (BNA) 1537 (4th Cir.), *vacated, reh'g granted en banc*, 922 F.2d 197 (4th Cir. 1990), *rev'd*, 925 F.2d 703, 18 Media L. Rep. (BNA) 1689 (4th Cir. 1991) (*en banc*); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 13 Media L. Rep. (BNA) 2438 (5th Cir. 1987); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 11 Media L. Rep. (BNA) 1001 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986); *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 7 Media L. Rep. (BNA) 2552 (6th Cir. 1982); *Street v. NBC*, 645 F.2d 1227, 7 Media L. Rep. (BNA) 1001 (6th Cir. 1981); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 11 Media L. Rep. (BNA) 1153 (S.D.N.Y. 1984); *Beech Aircraft v. National Aviation Underwriters*, 11 Media L. Rep. (BNA) 1401 (D. Kan. 1984); *Shockley v. Cox Enters.*, 10 Media L. Rep. (BNA) 1222 (N.D. Ga. 1983), *aff'd*, 770 F.2d 174 (11th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *Pep v. Newsweek*, 553 F. Supp. 1000, 9 Media L. Rep. (BNA) 1179 (S.D.N.Y. 1983); *Velle Transcendental Research Ass'n v. Sanders*, 518 F. Supp. 512, 7 Media L. Rep. (BNA) 1878 (C.D. Cal. 1981); *Costello v. Capital Cities Communications, Inc.*, 11 Media L. Rep. (BNA) 1738 (Ill. Cir. Ct. 1985), *aff'd in part, rev'd in part*, 505 N.E.2d 701 (Ill. App. Ct. 1987), *rev'd*, 532 N.E.2d 790, 15 Media L. Rep. (BNA) 2407 (Ill. 1988); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 9 Media L. Rep. (BNA) 2344 (Me. 1983).

301. See *Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944, 9 Media L. Rep. (BNA) 1857 (5th Cir. 1983); *Sisemore v. U.S. News & World Report, Inc.*, 662 F. Supp. 1529, 14 Media L. Rep. (BNA) 1590 (D. Alaska 1987); *Shockley v. Cox Enters.*, 10 Media L. Rep. (BNA) 1222 (N.D. Ga. 1983), *aff'd*, 770 F.2d 174 (11th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986).

302. See *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 8 Media L. Rep. (BNA) 1769 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 11 Media L. Rep. (BNA) 1153 (S.D.N.Y. 1984); *Beech Aircraft v. National Aviation Underwriters*, 11 Media L. Rep. (BNA) 1401 (D. Kan. 1984).

303. Because cases examined in Part II were not selected randomly, these patterns may not be representative of the universe of libel cases. Our purpose in providing these data is to give a fuller picture of the cases examined in this section.

section devoted to the facts, usually including extensive documentation of exculpatory factual information; an extensive review of *Sullivan* and its progeny, with focus on the doctrinal impediments to a successful lawsuit brought by a public plaintiff and reference to the constitutional gravity of libel actions against the press; and typically a brief application of the governing law, culminating in a conclusion that states or strongly implies a permissive behavioral norm. This law-oriented category has the largest number of cases analyzed in the second phase of the study.³⁰⁴ Moreover, the percentages of "writing" and "editing" cases with a law-oriented discussion were greater than the percentage of "research" cases with a law-oriented discussion: of twenty-four writing cases, eighteen were law oriented,³⁰⁵ and of twenty-one editing cases, fifteen were law oriented.³⁰⁶ Of thirty-two

304. Of the 77 cases involving allegations of actual malice in discussions of "research," "writing" and "editing," 49 (64%) were classified as law-oriented.

305. See *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 15 Media L. Rep. (BNA) 1721 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989); *Tavoulareas v. Piro*, 817 F.2d 762, 13 Media L. Rep. (BNA) 2377 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987); *Woods v. Evansville Press Co.*, 791 F.2d 480, 12 Media L. Rep. (BNA) 2179 (7th Cir. 1986); *Herbert v. Lando*, 781 F.2d 298, 12 Media L. Rep. (BNA) 1593 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 11 Media L. Rep. (BNA) 1577 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Pierce v. Capital Cities Communications*, 576 F.2d 495, 3 Media L. Rep. (BNA) 2259 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); *Perk v. Reader's Digest Ass'n*, 17 Media L. Rep. (BNA) 1115 (N.D. Ohio 1989), *aff'd*, 931 F.2d 408, 18 Media L. Rep. (BNA) 2098 (6th Cir. 1991); *Contemporary Mission v. New York Times Co.*, 665 F. Supp. 248, 14 Media L. Rep. (BNA) 1921 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 612, 15 Media L. Rep. (BNA) 1180 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988); *Saenz v. Playboy Enters.*, 653 F. Supp. 552, 13 Media L. Rep. (BNA) 1977 (N.D. Ill. 1987), *aff'd*, 841 F.2d 1309, 15 Media L. Rep. (BNA) 1043 (7th Cir. 1988); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 603 F. Supp. 377, 11 Media L. Rep. (BNA) 1681 (E.D. Pa.), *aff'd*, 780 F.2d 340, 12 Media L. Rep. (BNA) 1529 (3d Cir. 1985), *cert. denied*, 476 U.S. 1187 (1986); *Seymour v. A.S. Abell Co.*, 557 F. Supp. 951, 9 Media L. Rep. (BNA) 1098 (D. Md. 1983); *Pemberton v. Birmingham News Co.*, 482 So. 2d 257, 12 Media L. Rep. (BNA) 1465 (Ala. 1985); *Reed v. Northwestern Publishing Co.*, 530 N.E.2d 474, 15 Media L. Rep. (BNA) 2233 (Ill. 1988), *cert. denied*, 489 U.S. 1067 (1989); *Major v. Drapeau*, 507 A.2d 938, 12 Media L. Rep. (BNA) 2032 (R.I. 1986); *Margoles v. Hubbard*, 760 P.2d 324, 16 Media L. Rep. (BNA) 1196 (Wash. 1988); *Fremont Energy Corp. v. Seattle Post-Intelligencer*, 9 Media L. Rep. (BNA) 1569 (W.D. Wash.), *rev'd*, 688 F.2d 1285 (9th Cir. 1985).

306. See *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 14 Media L. Rep. (BNA) 2249 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988); *Steaks Unlimited v. Deaner*, 623 F.2d 264, 6 Media L. Rep. (BNA) 1129 (3d Cir. 1980); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 2 Media L. Rep. (BNA) 1545 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Silvester v. ABC, Inc.*, 650 F. Supp. 766, 13 Media L. Rep. (BNA) 1817 (S.D. Fla. 1986), *aff'd*, 839 F.2d 1491, 15 Media L. Rep. (BNA) 1138 (11th Cir. 1988); *Bryant v. Associated Press*, 595 F. Supp. 814, 11 Media L. Rep. (BNA) 1090 (D.V.I. 1984); *Dowd v. Calabrese*, 589 F. Supp. 1206, 10 Media L. Rep. (BNA) 2017 (D.D.C. 1984); *Seymour v. A.S. Abell Co.*, 557 F. Supp. 951, 9 Media L. Rep. (BNA) 1098 (D. Md. 1983); *Bellamy v. Arno Press*, 8 Media L. Rep. (BNA) 1420 (E.D.N.C. 1982); *Shutt v. Harte-Hanks*, 7 Media L. Rep. (BNA) 2559 (E.D. Mich. 1981); *Goodrick v. Gannett Co.*, 500 F. Supp. 125, 6 Media L. Rep. (BNA) 2165 (D. Del. 1980); *Pemberton v. Birmingham News Co.*, 482 So. 2d 257, 12 Media L.

research cases, however, sixteen were law oriented.³⁰⁷ Another difference between the law-oriented "writing" and "editing" cases on the one hand, and the law-oriented "research" cases on the other, is that a large majority of both the "writing" and "editing" cases involved motions for summary judgment,³⁰⁸ whereas only about half of the "research" cases involved motions for summary judgment.³⁰⁹ Finally, in *all* of the cases classified as law-oriented in all three behavioral groupings (research, writing, and editing), the media defendants prevailed.³¹⁰

B. *Discussions of Press Behavior as Egregious*

The tendency of courts to articulate or imply norms of journalistic behavior is most pronounced in cases involving press behavior that

Rep. (BNA) 1465 (Ala. 1985); Reader's Digest Ass'n v. Marin County Sup. Ct., 690 P.2d 610, 11 Media L. Rep. (BNA) 1065 (Cal. 1984), *cert. denied*, 478 U.S. 1009 (1986); Beamer v. Nishiki, 670 P.2d 1264, 10 Media L. Rep. (BNA) 1171 (Haw. 1983); Diesen v. Hessburg, 455 N.W.2d 446, 17 Media L. Rep. (BNA) 1849 (Minn. 1990), *cert. denied*, 498 U.S. 1119 (1991); Graham v. New York News, 2 Media L. Rep. (BNA) 2356 (N.Y. Sup. Ct. 1977).

307. See *Speer v. Ottaway Newspapers*, 828 F.2d 475, 14 Media L. Rep. (BNA) 1601 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988); *McDowell v. Paiewonsky*, 769 F.2d 942, 11 Media L. Rep. (BNA) 2396 (3d Cir. 1985); *Marcone v. Penthouse Int'l Magazine For Men*, 754 F.2d 1072, 11 Media L. Rep. (BNA) 1577 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Hardin v. Santa Fe Reporter, Inc.*, 745 F.2d 1323, 11 Media L. Rep. (BNA) 1026 (10th Cir. 1984); *Contemporary Mission, Inc. v. New York Times*, 665 F. Supp. 248, 14 Media L. Rep. (BNA) 1921 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 612, 15 Media L. Rep. (BNA) 1180 (2d Cir. 1988), *cert. denied*, 488 U.S. 856 (1988); *Silvester v. ABC*, 650 F. Supp. 766, 13 Media L. Rep. (BNA) 1817 (S.D. Fla. 1986), *aff'd*, 839 F.2d 1491, 15 Media L. Rep. (BNA) 1138 (11th Cir. 1988); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 603 F. Supp. 377, 11 Media L. Rep. (BNA) 1681 (E.D. Pa.), *aff'd*, 780 F.2d 340, 12 Media L. Rep. (BNA) 1529 (3d Cir. 1985), *cert. denied*, 476 U.S. 1187 (1986); *Murray v. Bailey*, 613 F. Supp. 1276, 11 Media L. Rep. (BNA) 1369 (N.D. Cal. 1985); *Joseph v. Xerox Corp.*, 594 F. Supp. 330, 11 Media L. Rep. (BNA) 1085 (D.D.C. 1984); *FoodScience Corp. v. McGraw-Hill, Inc.*, 592 F. Supp. 362, 10 Media L. Rep. (BNA) 2127 (D. Vt. 1984); *Pritchard v. Times S.W. Broadcasting*, 642 S.W.2d 877, 9 Media L. Rep. (BNA) 1048 (Ark. 1982); *McCoy v. Hearst Corp.*, 727 P.2d 711, 13 Media L. Rep. (BNA) 2169 (Cal. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Costello v. Capital Cities Communications*, 11 Media L. Rep. (BNA) 1738 (Ill. Cir. Ct. 1985), *aff'd in part, rev'd in part*, 505 N.E.2d 701 (Ill. App. Ct. 1987), *rev'd*, 532 N.E.2d 790, 15 Media L. Rep. (BNA) 2407 (Ill. 1988); *Gulf Publishing Co. v. Lee*, 434 So. 2d 687, 9 Media L. Rep. (BNA) 1865 (Miss. 1983); *Hepps v. Philadelphia Newspapers*, 485 A.2d 374, 11 Media L. Rep. (BNA) 1841 (Pa. 1984), *rev'd*, 475 U.S. 767 (1986); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 11 Media L. Rep. (BNA) 1609 (Va.), *cert. denied*, 472 U.S. 1032 and 473 U.S. 905 (1985).

308. Of the 18 law-oriented cases involving writing, 13 were dispositions of motions for summary judgment. Of the 15 law-oriented cases involving editing, 10 were dispositions of motions for summary judgment.

309. Of the 16 law-oriented cases involving research, 7 were dispositions of motions for summary judgment.

310. Again, these patterns may not be representative of the universe of libel cases. See *supra* note 303.

can be considered patently objectionable. In these cases, in which the journalistic conduct is not in significant dispute and the court considers the behavior egregious, courts appear comfortable making rule-like declarations. Because the press behavior appears unusual, indeed on the fringe of the profession, judicial signals about journalistic practice pose little risk of generating controversy or persuasive dissent. The problem is that such discussions produce language that can be used by parties in future litigation—and by courts in future decisions—to attack behavior that is decidedly more mainstream.

Below we discuss cases involving behavior clearly considered “egregious” from each of the principal groups of libel cases: research,³¹¹ writing,³¹² and editing.³¹³ The discussion outlines what was considered objectionable in each case and the norm that was declared or strongly suggested. We then show how each case was later cited, in cases in which the behavior was arguably less objectionable.

1. Discussions of Press Research

In *Alioto v. Cowles Communications, Inc.*,³¹⁴ a federal judge ruled in a bench trial that Joseph Alioto, the mayor of San Francisco, had proven actual malice on the part of a national news magazine that had accused the mayor of having a “web of alliances with . . . leaders of La Cosa Nostra.”³¹⁵ An investigative piece in *Look* magazine stated that Alioto, before becoming mayor, had assisted a mob figure in obtaining bank loans.³¹⁶ The article implied that the mayor had associated with “major hoodlums to provide the financial wherewithal for underworld business activities.”³¹⁷

The article’s principal source was the mob figure’s ex-son-in-law and former business associate, who told the reporters that the information was based on talks with the mob figure himself.³¹⁸ In an interview with the reporters, the source recounted the mob figure’s stories of numerous nighttime meetings with Alioto and several other underworld figures.³¹⁹ In a subsequent interview, the source expressed uncertainty about details of the meetings (i.e., the approximate dates and

311. See *infra* notes 314-43 and accompanying text.

312. See *infra* notes 344-72 and accompanying text.

313. See *infra* notes 373-96 and accompanying text.

314. 430 F. Supp. 1363, 2 Media L. Rep. (BNA) 1801 (N.D. Cal. 1977), *aff’d*, 623 F.2d 616, 6 Media L. Rep. (BNA) 1573 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

315. *Id.* at 1366, 2 Media L. Rep. (BNA) at 1802.

316. *Id.* at 1366-67, 2 Media L. Rep. (BNA) at 1802.

317. *Id.* at 1370-71, 2 Media L. Rep. (BNA) at 1806.

318. *Id.* at 1368, 2 Media L. Rep. (BNA) at 1804.

319. *Id.* at 1367, 1368, 2 Media L. Rep. (BNA) at 1803, 1804.

whether Alioto was always present).³²⁰ The reporters were unable to corroborate the source's information with a local FBI agent; moreover, a state law enforcement official investigating organized crime told the reporters that the source's claims were "ridiculous."³²¹ An individual whom the source identified as having attended the meetings denied the allegations.³²²

The touchstone for the trial judge's decision in favor of the plaintiff was the Supreme Court's language in *St. Amant v. Thompson* that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."³²³ Although the reporters and their editor claimed to have had a "reasonable and good faith belief in [the source's] trustworthiness" because the source appeared to have "no motivation to lie,"³²⁴ the court was unconvinced. The court considered the clear unreliability of the source's own source (the mob figure, whom the editor admitted believing was generally a "liar"), the "hearsay nature" of the information, "the time which had passed since the alleged events had taken place," the unreliable "tenor" of the source's accounts, the reporters' inability to corroborate the source's charges, and the fact that the source had made no such charges to the authorities in previous contacts with them.³²⁵ The thrust of the court's discussion was that the reporters' research was egregiously deficient; as a result, there were "obvious reasons [to] doubt" the veracity of the source and hence the truth of their own story.³²⁶ A norm about publishing information from a questionable source could be distilled from the court's analysis: the press should not publish serious allegations about purported past events based only on qualified statements of a source whose own source lacks credibility, and whose information cannot be corroborated by a knowledgeable, trustworthy source. Journalists or lawyers distilling this norm could logically conclude that a violation of the norm would imperil a media defendant in a libel action.

The *Alioto* case served as the basis for denying a media defendant's motion for summary judgment in a subsequent New York case, *Bruno v. New York News, Inc.*³²⁷ Like *Alioto*, *Bruno* involved an alle-

320. *Id.* at 1368, 2 Media L. Rep. (BNA) at 1804.

321. *Id.* at 1369, 2 Media L. Rep. (BNA) at 1804.

322. *Id.*, 2 Media L. Rep. (BNA) at 1805.

323. *Id.* at 1366, 2 Media L. Rep. (BNA) at 1802 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)).

324. *Id.* at 1370, 2 Media L. Rep. (BNA) at 1805.

325. *Id.* at 1370, 2 Media L. Rep. (BNA) at 1806.

326. *Id.*

327. 456 N.Y.S.2d 837 (App. Div. 1982).

gation of corruption against a public official.³²⁸ The New York court expressly relied on *Alioto* in finding a jury question on the issue of actual malice, based on the newspaper's behavior in publishing an uncorroborated allegation.³²⁹ *Bruno* is important because it demonstrates how a norm arising from one libel case can be miscited and misapplied in a subsequent case. The *Bruno* court relied on *Alioto* as persuasive authority in a case in which the behavior in evidence was not only significantly different from the behavior in *Alioto*, but also less obviously discreditable.

The *Bruno* court reversed a summary judgment for the media defendant with respect to the last of twelve articles about mismanagement of the New York State Lottery. The article recounted a string of events that were covered earlier by the same newspaper and culminated in the temporary shutdown of the Lottery.³³⁰ The article stated that the Lottery had been "deliberately withholding prize money" and that "[s]tate officials tried to hide the scandal."³³¹ The media defendant named no source for the accusation of intentional deception and cover-up.³³²

In finding a triable question of fact on the issue of actual malice, the court noted that

[i]t is critically significant that [by the date of publication] the reporters were likely to have been familiar with the contents of a . . . report of the State Comptroller, attached to their own moving affidavits, . . . [which] clearly negates any inference of intentional misconduct by Lottery officials . . . [and contains conclusions] consistent only with inadvertence, not deliberate choice.³³³

The court added: "In this respect, the instant case closely resembles *Alioto v. Cowles Communications, Inc.*, . . . where actual malice was inferred from the publisher's awareness of an official source contradicting charges of corrupt association."³³⁴

This reference seriously abbreviates *Alioto*'s holding and distorts the norm that the case produced. Actual malice in *Alioto* was inferred from a *number* of facts suggesting that a norm of research had been

328. The allegation against Alioto concerned activities before he became mayor of San Francisco, whereas the allegations in *Bruno* concerned misconduct of a lottery official while in office. *Id.* at 838.

329. *Id.* at 842.

330. *Id.* at 839.

331. *Id.* at 842.

332. *Id.*

333. *Id.*

334. *Id.*

violated,³³⁵ not simply "from the publisher's awareness of an official source contradicting [the] charges."³³⁶ In *Alioto*, the "official source contradicting charges of corrupt association"³³⁷ was a state law enforcement officer investigating organized crime. After learning about the allegations against Alioto from one of the reporters, the officer commented that "the report of the meeting [with a mob figure] was 'ridiculous.'"³³⁸ The officer's noncorroboration was one fact among several leading to the court's conclusion that "there were 'obvious reasons to doubt the veracity of the informant.'"³³⁹ The court's discussion of the officer, then, was part of a larger discussion of the unreliability of the principal source.

Misciting *Alioto* allowed the *Bruno* court to apply the prior case to a significantly different context and to an arguably less egregious set of behavioral facts. *Alioto* dealt with the unreliability of a principal source,³⁴⁰ whereas *Bruno* dealt with the availability of contradictory information.³⁴¹ In addition, while the press behavior in *Alioto* was shoddy enough to support a finding of "obvious reason[] to doubt,"³⁴² the evidence of culpable behavior in *Bruno* was comparatively slight. In *Bruno*, the court never said that the reporters had actual knowledge of the official contradictory source; the court merely found that "the reporters were likely to have been familiar with the contents" of a state report exonerating the plaintiff from fraud and misappropriation.³⁴³ Thus, a norm arising from a discussion of actual malice in a case involving egregious behavior can reappear and do mischief in circumstances far less clear cut.

2. Discussions of Writing

In *Kuhn v. Tribune-Republican Publishing Co.*,³⁴⁴ the Colorado Supreme Court reinstated a jury verdict for the plaintiffs, three public officials of the Greeley Department of Parks and Recreation. A news story reported that the plaintiffs accepted complimentary passes from

335. See *supra* notes 323-26 and accompanying text.

336. *Bruno*, 456 N.Y.S.2d at 842 (discussing *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 2 Media L. Rep. (BNA) 1801 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), 6 Media L. Rep. (BNA) 1573, *cert. denied*, 449 U.S. 1102 (1981)).

337. *Id.*

338. *Alioto*, 430 F. Supp. at 1369, 2 Media L. Rep. (BNA) at 1804.

339. *Id.* at 1370, 2 Media L. Rep. (BNA) at 1806.

340. *Id.*

341. *Bruno*, 456 N.Y.S.2d at 842.

342. *Alioto*, 430 F. Supp. at 1370, 2 Media L. Rep. (BNA) at 1806.

343. *Bruno*, 456 N.Y.S.2d at 842.

344. 637 P.2d 315, 7 Media L. Rep. (BNA) 2137 (Colo. 1981).

two private ski resorts.³⁴⁵ The story implied that the passes were bribes—that the gifts influenced the officials to include the two resorts in a state-sponsored ski program, while excluding other resorts.³⁴⁶

The court's opinion first examined the inadequacies of the reporter's research,³⁴⁷ like the court in *Alioto*,³⁴⁸ the Colorado Supreme Court clearly considered the reporter's efforts egregiously deficient. However, another serious defect for the court was the way in which the reporter wrote the story. The court noted that the article's "factual assertions" implied corruption by including the bald statement that "recreation officials accepted free passes."³⁴⁹ At trial the reporter admitted that in his research he had never asked "whether recreation officials personally used the passes,"³⁵⁰ and trial testimony showed that "no recreation officials used the passes."³⁵¹ The court quoted the reporter's testimony that "he worded the story so as to imply that recreation officials personally accepted the passes because, although he knew that the passes were given to the department [of parks and recreation], he wanted to 'humanize' the story."³⁵² The newspaper maintained that the story was "substantially true."³⁵³

In effect, the reporter maintained that his "humanized" version of the facts known to him simply rendered the story more accessible to the reader. The court was unmoved. Rejecting the "humanization" argument and ignoring the claim that the story was substantially correct, the court referred to the writing in its discussion of actual malice, and implied a norm about language: The press should not use words that literally go beyond the known facts if the words, read in the context of the story, have the effect of making an accusation of individual criminal or moral wrongdoing.³⁵⁴

A subsequent case in the same court, *Burns v. McGraw Hill Broadcasting Co.*,³⁵⁵ expressly relied on *Kuhn*.³⁵⁶ But, as in the exam-

345. *Id.* at 316, 7 Media L. Rep. (BNA) at 2137.

346. *Id.*

347. *Id.* at 319, 7 Media L. Rep. (BNA) at 2139-40.

348. *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 1370-71, 2 Media L. Rep. (BNA) 1801, 1805-06 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

349. *Kuhn*, 637 P.2d at 318-19, 7 Media L. Rep. (BNA) at 2139-40.

350. *Id.* at 318, 7 Media L. Rep. (BNA) at 2139.

351. *Id.* at 318 n.4, 7 Media L. Rep. (BNA) at 2139 n.4.

352. *Id.* at 318, 7 Media L. Rep. (BNA) at 2139.

353. *Id.* at 316, 7 Media L. Rep. (BNA) at 2137.

354. *See id.* at 318-19, 7 Media L. Rep. (BNA) at 2139-40.

355. 659 P.2d 1351, 9 Media L. Rep. (BNA) 1257 (Colo. 1983).

356. *Id.* at 1361-62, 9 Media L. Rep. (BNA) at 1264-65.

ple of *Alioto* and *Bruno* above,³⁵⁷ the *Burns* court took liberties with the earlier *Kuhn* case, unpersuasively finding similarities and unconvincingly applying the norm to find fault with the media defendant.

In *Burns*, a broadcaster reported that a policeman with the Denver Police Department Bomb Squad was injured in an explosion on the job. The reporter detailed the policeman's injury and stated that "his wife and five children have deserted him since the accident."³⁵⁸ The policeman's ex-wife sued the broadcaster, arguing that the word "deserted" falsely described her actions and defamed her in the eyes of the community.³⁵⁹ A Colorado jury found for the plaintiff.³⁶⁰

The Colorado Supreme Court upheld the finding of actual malice.³⁶¹ As in *Kuhn*, the court identified a number of research deficiencies³⁶² and then focused on the "wording"—in this case, on the word "deserted."³⁶³ The court first dismissed the defendant broadcaster's argument that the word was privileged as "opinion"; the court ruled that the word, in the context of the story, implied that the reporter "had inside knowledge" of "undisclosed circumstances" that supported the charge of desertion and hence did not qualify as pure opinion under analysis based on the *Restatement (Second) of Torts*.³⁶⁴

On the issue of actual malice, the court catalogued what the reporter "knew" before using the disputed word on the newscast. The reporter knew that the policeman and his wife had had marital problems before his injury, that the wife had "compelling reasons for divorcing" the policeman, and that she had filed for divorce before the injury occurred.³⁶⁵ The court also said that the reporter knew that "there had been a temporary reconciliation before and during [the policeman's] convalescence," but that a divorce had been granted two

357. See *supra* notes 327-43 and accompanying text.

358. *Burns*, 659 P.2d at 1354, 9 Media L. Rep. (BNA) at 1258.

359. *Id.*

360. *Id.* at 1354, 9 Media L. Rep. (BNA) at 1257.

361. *Id.* at 1362, 9 Media L. Rep. (BNA) at 1265.

362. *Id.* at 1361-62, 9 Media L. Rep. (BNA) at 1263-64.

363. *Id.* at 1356-61, 1362, 9 Media L. Rep. 1260-63, 1264.

364. *Id.* at 1360, 9 Media L. Rep. (BNA) at 1263. The case pre-dates *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), in which the United States Supreme Court declined to interpret the First Amendment as requiring a "wholesale defamation exemption" for "opinion" independent of existing doctrines of the law of defamation. *Id.* at 18. However, as Professor Smolla has pointed out, the Court did not endorse libel actions based on opinion but rather "substituted the old dichotomy between 'fact and opinion' with a new dichotomy between 'fact and non-fact.'" SMOLLA, LAW OF DEFAMATION, *supra* note 17, § 6.03[7][d]. From that perspective, it is unlikely that the outcome on the fact-opinion issue in *Burns* would be different under *Milkovich*.

365. *Burns*, 659 P.2d at 1362, 9 Media L. Rep. (BNA) at 1264.

years "after the accident."³⁶⁶ The court acknowledged the reporter's testimony that she "consciously chose or accepted the words in the story as an accurate portrayal of the events."³⁶⁷ However, the court held the writer to the objective standard of the "experienced reporter."³⁶⁸ "As an experienced reporter," the court stated,

[the defendant] must also have been aware that the word "deserted," when used in the context of the marital relationship, has an opprobrious connotation in the most common usage of the term. The use of a term with obvious pejorative connotations without underlying factual support is evidence of recklessness especially when the reporter has knowledge that the description is in fact untrue.³⁶⁹

The court concluded that, although the reporter "knew" that the wife had not "deserted" the policeman in the sense of "abandoned without . . . right," the reporter "apparently used the word to illustrate more vividly the situation surrounding [the policeman's] accident despite the word's emotional and derogatory connotation when applied to the marital relationship."³⁷⁰

The court then cited *Kuhn* for a legal conclusion—the proposition that "[w]hen one uses language which invites an inference that an individual has acted significantly at variance with community standards, and one fails to provide a factual basis for the derogatory characterization, then one 'knowingly risks the likelihood that the statements and inferences are false and thereby forfeits First Amendment protections.' "³⁷¹

The *Burns* decision is problematic for a number of reasons, most notably its reliance on *Kuhn*. *Kuhn*'s lesson was that words that literally exceed known facts should not be used if the words in context amount to a charge of criminal or moral wrongdoing.³⁷² This norm is slim authority for the discussion of "deserted" in *Burns*. In the context of its placement in the news story in *Burns*, use of the term "deserted" did *not* amount to a charge of criminal or even moral wrongdoing. The word's appearance in one peripheral sentence of the story, without emphasis or embellishment, suggests that a moral in-

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*, 9 Media L. Rep. (BNA) at 1265 (quoting *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319, 7 Media L. Rep. (BNA) 2137, 2140 (Colo. 1981)).

372. See *supra* note 354 and accompanying text.

dictment was neither intended nor likely to be inferred. As a result, greater leeway in word choice would seem permissible under *Kuhn*.

The result in *Burns* demonstrates again how a standard developed in the context of egregious behavior can be misapplied to words that are less troublesome, thus contributing to a finding of actual malice. The norm of *Kuhn* may have been plausible as applied to *Kuhn*'s facts, but its invocation in *Burns* was unfortunate and led to a questionable conclusion.

3. Discussions of Editing

In *Montandon v. Triangle Publications, Inc.*,³⁷³ a public figure plaintiff sued the publisher of *TV Guide*. The plaintiff argued that the magazine defamed her in a summary of the topic to be discussed on a forthcoming talk show.³⁷⁴ The talk show's producer gave *TV Guide* a promotional press release which stated the show's title ("From Party-Girl to Call-Girl?"), named the plaintiff as a scheduled guest, identified her as a "TV Personality" and author of a book (*How to Be a Party-Girl*), and stated that another guest on the same show would be a "masked-anonymous prostitute!"³⁷⁵ A *TV Guide* staff writer then rewrote the release and left out the question mark in the title, omitted the reference to the prostitute, and added that the plaintiff would discuss her book.³⁷⁶ The *TV Guide* editor then rewrote the blurb, naming the plaintiff as a scheduled guest, deleting the statement that the plaintiff would discuss her book, again deleting the question mark, and again omitting any reference to a prostitute.³⁷⁷ The plaintiff argued that the blurb in its final form³⁷⁸ falsely implied that she herself was a call girl and would address that part of the show's topic from personal experience.³⁷⁹

The jury found for the plaintiff.³⁸⁰ The California Court of Appeals affirmed, clearly regarding the editing behavior as egregious. The court stated that "[t]he very nature of the discussion topic-caption 'From Party Girl to Call Girl[?]' should and must have alerted [the staff writer] and [the editor] to be wary of possible libel by incorrectly

373. 120 Cal. Rptr. 186, (Ct. App.), *cert. denied*, 423 U.S. 893 (1975).

374. *Id.* at 187-88.

375. *Id.* at 188.

376. *Id.*

377. *Id.*

378. The blurb as finally written stated: "10:30 [2] Pat Michaels—Discussion [¶] [Color] 'From Party Girl to Call Girl.' Scheduled guest: TV Personality Pat Montandon and author of 'How to Be a Party Girl.' " *Id.*

379. *Id.* at 189-90.

380. *Id.* at 188.

labeling or implying that someone was a call girl.”³⁸¹ The court’s sense of egregious editing surely accounts for its overly facile step from “should” to “must have” in the quoted sentence. The court concluded that the editor’s position, that the average reader would not interpret the published blurb as stating that the plaintiff was a call girl, “flies in the face of reason.”³⁸² While the resulting false impression “was apparently not intentional, it was one which those responsible should have foreseen and one which showed a reckless disregard for the truth or falsity of the statement.”³⁸³ While the court relied on the language from *St. Amant* concerning the legitimacy of inferring state of mind from objective indicia,³⁸⁴ its conclusion was forced and incomplete. The effect of the decision was to set a standard of conduct for editors akin to the standard for writers indicated in *Kuhn*: Editors should not use words that literally go beyond the known facts if the words, read in context, amount to an individualized accusation or statement of criminal behavior or dubious moral character.

While the norm itself may seem sensible, it is not clear that it was even violated in *Montandon*. In the context of *TV Guide*’s brief program summaries, could the phrase in question amount to a statement, much less an accusation, of prostitution? If the implicit norm was not violated, the “egregiousness” quotient of the case falls, and the legal conclusion of actual malice seems farfetched. Perhaps the decision is explicable as a reflection of a mid-1970s sense of “egregious” editing behavior in the wake of several prominent libel cases that exposed the often-messy internal processes of journalism.³⁸⁵ Moreover, the context of sexual innuendo in a magazine of wide circulation may have provoked the court. In any event, *Montandon* is a relatively early example of the judicial reliance on perceived (yet dubious) egregiousness as a substitute for more rigorous analysis of state of mind.

The larger importance of this state case is its role as a precedent: It is cited both prominently and approvingly in a celebrated later deci-

381. *Id.* at 189.

382. *Id.*

383. *Id.* at 193.

384. *Id.* at 192 (citing *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)).

385. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court noted several prominent cases of the latter 1960s that subjected intimate details of “the editorial process”—including motives for publishing, use of sources, conversations among editors about article development, decisions about interviews and investigations—to “close examination,” *id.* at 160-61 n.6 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). Professor Smolla writes that the 1974 case, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), “set the tone for the anti-media mood that would gather increasing steam over the next ten years.” RODNEY A. SMOLLA, *SUING THE PRESS* 57 (1986).

sion involving editing, *Hunt v. Liberty Lobby*,³⁸⁶ a federal appellate case in which the media defendant again lost.

The *Hunt* case involved another plaintiff linked to unsavory behavior. A weekly newspaper published a story reporting "an elaborate plot within the Central Intelligence Agency (CIA) to frame [E. Howard] Hunt for the Kennedy assassination."³⁸⁷ Hunt's libel suit focused on the roles of the newspaper's publisher and managing editor; for jurisdictional reasons, the story's free-lance author was not a party.³⁸⁸ One of Hunt's arguments was that the editor wrote misleading and defamatory headlines for the story.³⁸⁹ While the story's text concerned the CIA's "plan to falsely accuse or frame Hunt"³⁹⁰ for the President's murder, Hunt argued that the headlines surrounding the story conveyed quite a different message—that Hunt had in fact killed the President and would be prosecuted for the crime.³⁹¹

The Eleventh Circuit discussed *Montandon* at length, identifying the case as involving editing and reviewing the editor's claim that he "did not believe that the program note labeled Ms. Montandon a call girl."³⁹² On the basis of *Montandon*, the *Hunt* court concluded that "an inference of actual malice can be drawn when a defendant publishes a defamatory statement that contradicts information known to him, even when the defendant testifies that he believed that the statement was not defamatory and was consistent with the facts within his knowledge."³⁹³

Applying this conclusion, the *Hunt* court stated: "[I]t is obvious that the headlines could have conveyed the impression to a fact finder that Hunt was involved in the assassination. Viewing the headlines alone, the jury could have reasonably found that the [newspaper] simply was reporting a truthful accusation by a federal government agency."³⁹⁴ The court then drew on some highly ambiguous testimony of the editor to conclude that the editor "knowingly chose language

386. 720 F.2d 631, 10 Media L. Rep. (BNA) 1097 (11th Cir. 1983).

387. *Id.* at 634, 10 Media L. Rep. (BNA) at 1098.

388. *Id.* at 634 n.1, 10 Media L. Rep. (BNA) at 1097 n.1.

389. The original headline by the author of the story was "The JFK Assassination: New Developments and Another Coverup." *Id.* at 646, 10 Media L. Rep. (BNA) at 1108. The court found that the managing editor changed the headline to "the following headlines and subheadlines: 'CIA to Nail Hunt for Kennedy Killing,' 'CIA to 'Admit' Hunt Involvement in Kennedy Slaying,' 'They'll Hang Hunt,' and 'Posing as a Bum.'" *Id.*

390. *Id.*

391. *Id.* at 646, 10 Media L. Rep. (BNA) at 1108-09.

392. *Id.* at 644, 10 Media L. Rep. (BNA) at 1107.

393. *Id.* at 645, 10 Media L. Rep. (BNA) at 1107.

394. *Id.* at 646, 10 Media L. Rep. (BNA) at 1108.

that was subject to a false and highly defamatory interpretation," and again cited *Montandon*.³⁹⁵

Hunt, then, applied the *Montandon* norm: Editing must be literally faithful to known facts when statements, read in context, amount to serious allegations. But just as the norm may not have been violated in *Montandon*, it may not have been violated in *Hunt*. The court in *Hunt* viewed the "headlines alone," removing them from the context of the whole article, and assessing them in isolation.³⁹⁶ In both cases, then, egregiousness may simply have been lacking, so that the court's leap to a finding of actual malice was particularly unconvincing. Still, with the *Montandon* case as a precedent, it was easy to make a similar mistake in the even less clear cut scenario of *Hunt*.

C. Fact-Oriented Discussion of Press Behavior

Fortunately, press behavior is not often "egregious." Restrictive norms, however, do emerge from other sorts of judicial discussions. Often courts discuss and analyze press behavior in fact-laden passages that appear premised on an implicit restrictive norm. These norms are buried in the judicial opinions; we cannot say that subsequent courts retrieve and invoke them as precedents in the way courts retrieve norms from the cases of "egregious" behavior.³⁹⁷ Implicit standards in fact-oriented discussions are nevertheless problematic for at least two other reasons. First, these standards contribute to the disposition of the case in which they arise, most often to the disadvantage of the media defendant in the context of a motion for summary judgment. Second, over time an unquestioned practice of implicit standards-creation in fact-laden discussions is likely to become a judicial habit, to the probable long-term disadvantage of journalistic freedom. As courts become accustomed to standards creation "between the lines," they become more comfortable with standards creation for the press generally. Explicit norms of the precedent-setting kind become easier to pronounce and defend.

In this section, cases are taken from the three principal categories of press conduct—research, writing, and editing—to illustrate the fashioning of implicit behavioral standards in the course of a decision's factual analysis.

395. *Id.*, 10 Media L. Rep. (BNA) at 1109. The citation to *Montandon* was to the page discussing "the very nature of the discussion topic-caption" and the editor's interpretation of the edited text as "fly[ing] in the face of reason." See *Montandon v. Triangle Publications, Inc.*, 120 Cal. Rptr. 186, 189 (Ct. App.), *cert. denied*, 423 U.S. 893 (1975).

396. 720 F.2d at 646, 10 Media L. Rep. (BNA) at 1108-09.

397. See, e.g., *supra* notes 326-43 and accompanying text.

1. Discussions of Press Research

In *DeLoach v. Beaufort Gazette*,³⁹⁸ the South Carolina Supreme Court affirmed a plaintiff's jury verdict against a media defendant for actual and punitive damages.³⁹⁹ A newspaper erroneously reported that police arrested the plaintiff and charged him with assault and battery. In fact, the plaintiff engaged in a "fight or a scuffle" outside a bar with another person, who then "reported the incident to the City Police but did not swear out a warrant for the plaintiff."⁴⁰⁰ The police completed an incident report but neither arrested the plaintiff nor charged him "with any crime in relation to the incident."⁴⁰¹

In researching the story, the reporter talked with a police department spokesman.⁴⁰² At trial, the reporter and police spokesman gave diametrically different accounts of their conversation; the police spokesman denied telling the reporter that a warrant had been issued or that the plaintiff had been arrested (or charged), while the reporter testified that his source for all the story's misinformation was the police spokesman.⁴⁰³ In affirming a verdict for the plaintiff, the South Carolina Supreme Court emphasized that "[i]t is obvious that the jury" believed the police spokesman, and not the reporter.⁴⁰⁴ The court concluded:

In light of [the spokesman]'s version of what he told the reporter and in light of that which he denies having told the reporter, it is clearly inferable that the reporter had a high degree of awareness of the probable falseness of the statement he printed or had serious doubts as to its truth.⁴⁰⁵

The *DeLoach* decision is unpersuasive. Even if the jury believed that the police spokesman did not give erroneous information to the reporter, it does not follow that the reporter fabricated the item or seriously doubted its truth. While the court's conclusion explicitly turned on viewing the case as a matter of credibility,⁴⁰⁶ earlier discussion in the opinion suggests an additional impetus behind the court's affirmance of the jury verdict. That discussion included two references to unusual behavior on the part of the reporter in researching

398. 316 S.E.2d 139, 10 Media L. Rep. (BNA) 1733 (S.C.), *cert. denied*, 469 U.S. 981 (1984).

399. *Id.* at 141, 10 Media L. Rep. (BNA) at 1733.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*, 10 Media L. Rep. (BNA) at 1733-34.

404. *Id.* at 142, 10 Media L. Rep. (BNA) at 1734.

405. *Id.*

406. *Id.*

the story. The references contained no legal citation or rule but were quite conspicuous in the court's opinion. The court cited the police spokesman's testimony that the reporter came to the department "almost everyday" and "always checked the public arrest docket."⁴⁰⁷ The implication is that in this instance the reporter must not have verified his information the usual way. The court then cited the reporter's own testimony acknowledging a disparity between his usual research practices and the conduct in question:

The reporter testified that it was his usual practice to check the public arrest docket, which was in an adjoining room and easily available to him, before writing a story. On this occasion, he did not, ostensibly because of an eleven o'clock deadline.⁴⁰⁸

The court further noted that the reporter "inadvertently destroyed the notes" taken during the talk with the police spokesman and failed to file a report with the newspaper explaining the circumstances surrounding the inaccuracy.⁴⁰⁹

By twice mentioning the reporter's failure to check the arrest docket, the court arguably was suggesting that reporters should follow research practices that are customary in their organizations, particularly when the information to be published concerns a criminal charge. In the context of the opinion, the reporter's "usual practices" stood for a benchmark of normal professional behavior against which the excuse of a deadline fell flat. The court also apparently cited the reporter's other missteps—getting rid of his notes and neglecting to provide a written report to his employer—as questionable departures from the newspaper's standard practices.⁴¹⁰ As the *DeLoach* court saw matters, the research practices recognized by the newspaper were reasonable professional norms which the reporter should have followed.

All this remained implicit in the opinion, probably because the court realized that elaborating the precise role of a newspaper's internal norms in the fault calculus would be a complicated matter. Perhaps the court was wary of considering questions such as: Is a reporter's "everyday practice" the same thing as an internal norm of a newspaper? Should courts defer to norms officially adopted by a newspaper, viewing them as presumptively reasonable? How is a failure to observe an internal norm relevant to the actual malice inquiry?

407. *Id.* at 141, 10 Media L. Rep. (BNA) at 1734.

408. *Id.*

409. *Id.*

410. *Id.*

Staying clear of these questions, the *DeLoach* court implied that a reporter will be held to "usual" norms of verification when criminal charges are to be published, as long as those norms strike the court as reasonable, with "reasonable verification" appearing to mean checking with an obvious and available source.

2. Discussions of Writing

In *Golden Bear Distributing Systems v. Chase Revel, Inc.*,⁴¹¹ the United States Court of Appeals for the Fifth Circuit affirmed a jury verdict in favor of a plaintiff corporation complaining that the juxtaposition of truthful statements in a business column created false and defamatory implications about the plaintiff's business practices.⁴¹² A regular feature of the defendant's monthly magazine was a column entitled "Fraud," which exposed "instances of consumer and investor fraud."⁴¹³ The column in question discussed a parent company, Golden Bear of California, and several of its franchises with similar names. The column reported a lawsuit brought by the California Attorney General against the parent company, alleging investment fraud.⁴¹⁴ It also described legal problems faced by one of the franchises, Golden Bear of Utah; in that context, the column stated that "Golden Bear[s] promises were consistent throughout the country"⁴¹⁵ and cited a promotional effort by a marketing director employed by yet another franchise, Golden Bear of Texas.⁴¹⁶ As the court noted, the article "did not expressly state that Golden Bear of Texas defrauded investors, or that it was under investigation,"⁴¹⁷ and it made no false statements or explicit aspersions about the quite innocent Texas franchise.⁴¹⁸ Nonetheless, Golden Bear of Texas sued the magazine on the basis of "the juxtaposition of truthful statements about one company [i.e., the plaintiff] with truthful statements about the illegal operations of an independent company of the same name located in a different state [i.e., the parent company]."⁴¹⁹ A jury awarded compensatory and punitive damages to the plaintiff.⁴²⁰

411. 708 F.2d 944, 9 Media L. Rep. (BNA) 1857 (5th Cir. 1983).

412. *Id.* at 948, 9 Media L. Rep. (BNA) at 1859.

413. *Id.* at 946, 9 Media L. Rep. (BNA) at 1858.

414. *Id.* at 947, 9 Media L. Rep. (BNA) at 1858.

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.* at 948, 9 Media L. Rep. (BNA) at 1859.

419. *Id.*

420. *Id.* at 946, 9 Media L. Rep. (BNA) at 1857.

The court determined that, to a reasonable jury, the juxtaposed statements could imply false and defamatory meaning about the plaintiff:

The article stated that Golden Bear's promises were consistent throughout the country. The article went on to characterize the promises made by Golden Bear of California as false. It was reasonable for the jury to find that an ordinary reader could conclude that the Texas company's promises were false as well.⁴²¹

In effect, the Fifth Circuit signalled to journalists a concern that, in certain circumstances, the presentation of facts within successive sentences of an article can mislead and confuse. An implicit norm was clearly at work: Where allegations of wrongdoing are included, writers should not "mix" in one place information susceptible to confusion, but should differentiate the information by separate placement within the text. This norm, unstated but apparent from the court's logic, addresses narrative structure rather than literal content. In the face of such analysis, cautious writers may steer clear of danger by placing one idea per paragraph in stories containing defamatory content and references to a number of different persons. In *Golden Bear*, in which the placement of literally true facts led to liability for a false implication, the court showed no discomfort with assuming a role closely akin to that of an editor-in-chief.

3. Discussions of Editing

In *Sharon v. Time, Inc.*,⁴²² a federal district court judge considered, in the context of a summary judgment motion, a compendium of journalistic behavior. Much of the discussion concerned facts surrounding the alleged failure of *Time* editors to be sufficiently skeptical of a reporter who had been placed on probation for a prior incident of "possible unreliability" in political news reporting.⁴²³ The court carefully recounted deposition testimony relating to the editors' knowledge of the prior incident and their willingness to take the reporter at his word in the circumstances at issue in *Sharon*.⁴²⁴

The court interspersed its summaries of deposition testimony with conclusions about whether summary judgment was appropriate. After detailing the reporter's previous incident of unreliability, the court wrote that "[a] jury could . . . find that . . . [in light of the past

421. *Id.* at 948-49, 9 Media L. Rep. (BNA) at 1859.

422. 599 F. Supp. 538, 11 Media L. Rep. (BNA) 1153 (S.D.N.Y. 1984).

423. *Id.* at 572, 11 Media L. Rep. (BNA) at 1179.

424. *Id.* at 570-78, 11 Media L. Rep. 1177-85.

incident, the reporter] should have been more closely supervised by [the bureau chief] and others at *Time*.”⁴²⁵ This implied an unsurprising standard: Editors should supervise closely a reporter whose recent conduct has raised serious questions of credibility. However, the court did not stop there. Still discussing the prior incident, the court recounted that *Time*’s chief of correspondents had noticed that the reporter had “read into” a source’s “denial of [a story] a confirmation of his story.”⁴²⁶ The court concluded that “a jury could find” that the editors knew that the reporter “had a tendency to report to his superiors that he had confirmed a story even though the person giving the ‘confirmation’ had not clearly been questioned about the information for which he was being used as a source.”⁴²⁷ In essence, this conclusion stated a standard for both reporters and their editors: Reporters should corroborate facts by engaging their sources in direct dialogue; they should not merely draw inferences from conversations had with sources. Furthermore, editors should enforce the standard, particularly if they are aware that a reporter has not followed this model of confirmation in the past.

The court also noted deposition testimony about the “fact-checking process” employed generally by the media defendant as well as the manner in which that process was employed in writing the story at issue in *Sharon*.⁴²⁸ The court observed that *Time*’s fact-checkers did not double-check the story other than to compare the story with other *Time*-generated materials (i.e., memoranda on file). “[D]espite the claim that everyone had read the *Commission Report* [a public document important to the story],” the court wrote, no one at *Time* “ever questioned the fact that, in contrast to the *Report*’s discussion of myriad other events, the *Report* never mentions either [an unpublished Appendix prominently discussed in the story being litigated in *Sharon*] or any Commission exhibit numbers in connection with [the incident described in the story being litigated].”⁴²⁹ The court suggested, therefore, that fact checking should consist of more than comparing a defendant’s reporting to the defendant’s own previously-generated materials.

In addition, the court wrote that this “seems to be precisely the kind of incongruity which the researcher’s guide [*Time*’s own internal rulebook] refers to as cause for checking a story more closely. . . .

425. *Id.* at 572, 11 Media L. Rep. (BNA) at 1179.

426. *Id.*

427. *Id.* at 572, 11 Media L. Rep. (BNA) at 1180.

428. *Id.* at 579, 11 Media L. Rep. (BNA) at 1185.

429. *Id.*

Time's researcher's handbook warns fact checkers to beware of stories that are 'factually correct sentence by sentence, yet dead wrong in overall impact.'"⁴³⁰ The court thereby strongly suggested that a media defendant should follow its own rules of independent verification of politically sensitive stories—with verification referring not only to individual statements but also to the "overall impact."

D. Law-Oriented Discussion of Press Behavior

The cases involving behavior considered "egregious" and the cases containing fact-laden discussions of behavior produced *restrictive* norms—those that limit the discretion of editors and reporters. In contrast, the cases involving law-oriented analysis produced *permissive* norms,⁴³¹ emphasizing the wide scope of discretion accorded to good-faith research, writing, and editing.

Thus, it seems that *Sullivan* has spawned two tiers of journalistic standards fashioned by the courts. One tier is a set of restrictions, the other a set of freedoms. The restrictive norms seem responsive to the question, "What is good journalism?" while the permissive norms seem responsive to the question, "What is good-faith journalism?" The resulting system—a blend of restrictive and permissive norms—may be confusing to observers, especially journalists. It would seem that the two tiers pull the practice of journalism in different directions, one offering a safe harbor for following certain behavioral rules, the other offering a safe harbor based primarily on journalistic good faith.

In the section below, we analyze the law-oriented cases, decisions emphasizing *Sullivan* and the First Amendment's protection of the press. In cases in this category involving the writing and editing process, the courts favor the press and yield permissive norms.⁴³² In cases involving the research process, the courts are sometimes less permissive.⁴³³ In some cases, they rely entirely upon precedent and state permissive norms for research which favor the press defendant. In others, they refer less to the legal formulations of precedent and instead delve deeply into the research conduct at issue, impliedly stating restrictive norms that favor the plaintiff.

430. *Id.* at 579, 11 Media L. Rep. (BNA) at 1186.

431. See *supra* notes 304-09 and accompanying text (indicating that the law-oriented category of cases is the largest in present study).

432. See *supra* notes 304-09 and accompanying text (indicating that the large majority of "writing" and "editing" cases in the present study were classified as law-oriented, and in all law-oriented "writing" and "editing" cases, media defendants prevailed).

433. See *supra* notes 295, 300, and 307 and accompanying text. Of thirty-two "research" cases in the present study, sixteen were classified as law-oriented and twelve were classified as fact-oriented. The remaining four were in the "egregious" category.

1. Discussions of Press Research

In *Gulf Publishing Co. v. Lee*,⁴³⁴ the Mississippi Supreme Court reversed a verdict for two public-official plaintiffs against a daily newspaper.⁴³⁵ The paper reported a public outcry against a county board supervisor's decision not to pave a well-traveled public road. The story's unflattering portrait of the supervisor stated that the supervisor paved a less-used road that provided access to a new subdivision developed by two local public officials (the plaintiffs), and that the supervisor paved another road on which only one person, the supervisor's daughter, had a home.⁴³⁶ In their libel suit, the two public officials argued that the allegations about the paved roads contained material inaccuracies that conveyed the impression that the plaintiffs "were recipients of favored treatment" by the supervisor.⁴³⁷ The plaintiffs claimed the story implied that they had obtained private advantage because of their public status.

The plaintiffs' proof of actual malice focused on the reporter's research. One plaintiff testified that he told the reporter in an interview hours before deadline that the roads in question had been privately paved at plaintiffs' expense.⁴³⁸ In addition, one of the plaintiffs testified that he offered to show the reporter canceled checks and invoices as proof, but that the reporter "told him this was unnecessary."⁴³⁹ The reporter denied that this conversation took place, conceding only that a conversation occurred after the relevant edition of the paper had been published.⁴⁴⁰ The plaintiff's theory, then, was that the reporter's research turned up contrary information that the reporter chose to ignore.

The Mississippi Supreme Court's analysis of fault focused on the reporter's state of mind. The court twice quoted and italicized the language of *St. Amant* requiring "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication."⁴⁴¹ Invoking *Sullivan*,⁴⁴² *Curtis*,⁴⁴³

434. 434 So. 2d 687, 9 Media L. Rep. (BNA) 1865 (Miss. 1983).

435. *Id.* at 688, 9 Media L. Rep. (BNA) at 1866.

436. *Id.* at 689-90, 9 Media L. Rep. (BNA) at 1867.

437. *Id.* at 693, 9 Media L. Rep. (BNA) at 1871.

438. *Id.* at 690, 9 Media L. Rep. (BNA) at 1868.

439. *Id.*

440. *Id.* at 692, 9 Media L. Rep. (BNA) at 1869.

441. *Id.* at 696, 9 Media L. Rep. (BNA) at 1873 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

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

443. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Gertz,⁴⁴⁴ other Supreme Court libel opinions, and Mississippi cases, the "law-oriented" decision showed no inclination by the court to treat the case as if it involved "egregious" research or required intensive factual examination of the research methods employed or ignored.⁴⁴⁵ In fact, after recounting the boiler-plate doctrinal language from leading cases, the court confined its analysis to the reporter's post-publication conduct, discounting evidence that the jury apparently had believed.⁴⁴⁶ For the court, the reporter's post-publication statement to his editor that he had "messed up" indicated "a state of mind contrary to any supposition that when he submitted the article for publication he either knew or seriously doubted that it was false."⁴⁴⁷ In addition, the newspaper had published a retraction in the next edition.⁴⁴⁸

Gulf Publishing, heavily influenced by *Sullivan*'s press-protective spirit and rule, conceives of journalism in terms of good-faith inquiry and speech. According to this view, the mechanics of research are less important than a good-faith effort. *Gulf Publishing* thus suggests a permissive norm of research. Under this norm, good-faith journalism can include error followed by admission of the error and prompt publication of a correction.⁴⁴⁹

Sometimes the same set of facts will generate a fact-oriented, restrictive approach to research on one level of judicial action but a law-oriented, permissive approach to research on another level. An example is *Costello v. Capital Cities Communications Co.*,⁴⁵⁰ in which a newspaper editorial charged that the plaintiff, an elected chair of a county board, "lied" during his campaign when he said he would op-

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

445. *Gulf Publishing*, 434 So. 2d at 695-97, 9 Media L. Rep. (BNA) at 1872-74.

446. *Id.* at 697, 9 Media L. Rep. (BNA) at 1874.

447. *Id.*

448. *Id.*

449. Some commentators believe that this degree of permissiveness is precisely the drawback of *Sullivan* and that the Supreme Court has countenanced too wide a spectrum of press behavior. See, e.g., Clark R. Mollenhoff, *25 Years of Times v. Sullivan*, THE QUILL, Mar. 1989, at 27. Others insist on the necessity of the behavioral "breathing space," *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)), made possible by generous legal rules and do not see a debasing of the journalistic enterprise through permissive doctrine. See, e.g., Bruce W. Sanford, *Times v. Sullivan: The Music Still Plays Sweetly*, THE QUILL, Mar. 1989, at 7. Those taking the latter approach would view at least some permissive norms as consistent with both good journalism and good-faith journalism.

450. 11 Media L. Rep. (BNA) 1738 (Ill. Cir. Ct. 1985), *aff'd in part, rev'd in part*, 505 N.E.2d 701 (Ill. App. Ct. 1987), *rev'd*, 532 N.E.2d 790, 15 Media L. Rep. (BNA) 2407 (Ill. 1988) [hereinafter *Costello II*].

pose a new sales tax absent a voter referendum on the issue.⁴⁵¹ The newspaper based its charge on two facts: The plaintiff expressed opposition to a new tax in a pre-election interview, and, once elected, the plaintiff failed to express his views at a county board meeting where plans for a tax were set in motion. The newspaper's editorial blasted the plaintiff for his silence at the meeting.⁴⁵²

The plaintiff argued that the newspaper's editorial was wholly inaccurate and that fault could be inferred from the editorial writer's lack of research. Instead of flip-flopping on the tax issue, the plaintiff instead had maneuvered opposition to the tax behind the scenes and had kept silent at the meeting to comply with parliamentary rules requiring neutrality of the chair.⁴⁵³ Lacking this information, the newspaper's publisher and editor concluded that the plaintiff was a liar "sitting on his gavel," indistinguishable "from any other politician in the bunch."⁴⁵⁴

In a bench trial, the judge focused on the newspaper's research into the allegation of dishonesty. Noting "the cavalier lack of care and effort of the defendants in their investigative procedures,"⁴⁵⁵ the judge singled out the editorial writer's questionable reliance on two novice board members whom the judge considered superficial sources of information and whose testimony failed, in the judge's estimation, to support the newspaper's claim of ignorance about the true facts.⁴⁵⁶ The judge then listed knowledgeable officials whom the newspaper failed to consult, including senior board members of both political parties, and pointed out that the newspaper's own past stories about the plaintiff cast doubt on the allegations in the editorial.⁴⁵⁷ This fact-laden discussion suggested that the defendants' "objective fact-gathering efforts were . . . woeful and inadequate,"⁴⁵⁸ and that "[i]n essence, they did not know the truth, nor care to print the truth."⁴⁵⁹ Plainly, the judge's opinion was driven by the implicit norm that when journalists make serious charges of political dishonesty, they should check with clearly knowledgeable sources.

451. *Id.* at 1739; see also *Costello v. Capital Cities Media, Inc.*, 445 N.E.2d 13, 14, 9 Media L. Rep. (BNA) 1434 (Ill. App. Ct. 1982) [hereinafter *Costello I*].

452. *Costello I*, 445 N.E.2d at 14-15, 9 Media L. Rep. (BNA) at 1434-35.

453. *Costello II*, 11 Media L. Rep. (BNA) at 1739-40.

454. *Costello I*, 445 N.E.2d at 15, 9 Media L. Rep. (BNA) at 1435.

455. *Costello II*, 11 Media L. Rep. (BNA) at 1740.

456. *Id.*

457. *Id.*

458. *Id.* at 1741.

459. *Id.* at 1740.

The Illinois Supreme Court viewed the reporter's research efforts differently.⁴⁶⁰ That court adopted a law-oriented approach to research,⁴⁶¹ and rejected the trial court's conclusions.⁴⁶² Most likely driven by a permissive norm that good-faith checking into the possibility of dishonesty based on one public meeting does not require inquiry into the views of political veterans, the high court concluded that while "[t]he evidence does convincingly demonstrate that the defendants were careless and professionally inadequate in investigating [the plaintiff's behavior]," the requisite state of mind had not been established with convincing clarity.⁴⁶³

The *Costello* decisions, then, illustrate the use of fact-oriented analysis and a restrictive norm at one level, and law-oriented analysis and a permissive norm at another level of the same case. As noted earlier, the choice of one kind of analytic approach and norm over another seems related to the judicial choice of the underlying question at the outset: "What is good journalism?" on the one hand, versus "What is good-faith journalism?" on the other. We might then ask what lies behind the choice of one of these situating questions. A few explanations can be put forth. First, and most mundane, the *Costello* opinions disclose a basic difference in the reading of key testimony; the trial judge believed that one of the sources told the newspaper the truth about the plaintiff in advance of publication,⁴⁶⁴ while the high court was much less sure.⁴⁶⁵ Believing a key fact prompted the trial judge to stress the facts as he saw them, whereas uncertainty about the fact prompted a more law-oriented focus in the high court.

A second explanation may lie in the difference between a "constitutional" orientation and a "tort" orientation on the part of the judges—or, more precisely, the difference between a "liberty" analysis and a "duty" analysis. In the context of journalistic research, liberty analysis errs on the side of the media defendant, views the press as a fragile voice jeopardized by censorial forces in society and blocked by impediments to information, and seeks to preserve for the press as much discretion and as wide a margin of error as possible. The prem-

460. *Costello v. Capital Cities Communications, Inc.*, 532 N.E.2d 790, 15 Media L. Rep. (BNA) 2407 (Ill. 1988) [hereinafter *Costello III*].

461. The court cited *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), for the rules that reckless disregard "may be found only where the evidence shows that the defendant in fact entertained serious doubts" and that "[a]ctual malice is not measured by what a reasonably prudent person would have published or should have investigated before publishing." *Costello III*, 532 N.E.2d at 797-98, 15 Media L. Rep. (BNA) at 2413-14.

462. *Costello III*, 532 N.E.2d at 798-99, 15 Media L. Rep. (BNA) at 2414-15.

463. *Id.* at 798, 15 Media L. Rep. (BNA) at 2414.

464. *Costello II*, 11 Media L. Rep. (BNA) at 1740.

465. *Costello III*, 532 N.E.2d at 798-99, 15 Media L. Rep. (BNA) at 2414.

ise of liberty analysis is that the press's freedom to check governmental authority makes self-governance possible; liberty analysis invokes the rule of law to deflect undue judicial intrusion into editorial decisions. Duty analysis, on the other hand, errs on the side of the plaintiff. It views the press not as a fragile institution but as a robust player in the social and political environment, secure in its role as the "fourth estate," with a corresponding obligation to exercise care in the gathering and publication of defamatory information. Duty analysis considers individual reputation as the imperilled social value, seeks to ensure press accountability through the deterrent effect of tort law, and often manifests itself in fact-intensive opinions.

In taking a duty approach to the *Costello* case, the trial judge may have justified his exacting standard by viewing research as one step removed from the core compositional process of writing and editing and thus subject to greater legal control. The appropriate measure of that control—the scope of a duty of careful research—was apparently determined by the trial judge with reference to the seriousness of the charges that the newspaper was about to make. For the high court, on the other hand, the touchstone was not duty but liberty—the press's liberty to perform the journalistic role emphasized in *Sullivan*, the liberty to inform, to enlighten, and to provoke public debate. This approach clearly tilts in favor of the concerns of constitutional law and against the worries of tort.

The product of the high court's analysis was not a norm of good journalism; the court emphasized that the press behavior was shoddy.⁴⁶⁶ The court made clear, however, that the conduct passed inspection for good faith. The effect of the press victory was to situate that conduct just within the bounds of acceptability, if not in the mainstream. While journalists may applaud the final result in *Costello*, the conflicting judicial approaches and norms in the opinions may leave them bewildered about the law's relation to their own professional behavior. *Sullivan* has spawned a standards-creating enterprise from which two sets of norms have emerged, restrictive and permissive, with little apparent connection between the two. As illustrated by the two *Costello* opinions, a profession that lacks its own universal code of conduct is unlikely to find straightforward direction in the law.

466. *Id.* at 798, 15 Media L. Rep. (BNA) at 2414.

2. Discussions of Writing

In *Margoles v. Hubbard*,⁴⁶⁷ the Washington Supreme Court disavowed decisions by both a trial judge and an appellate panel denying a press defendant's motion for summary judgment.⁴⁶⁸ The plaintiff, a public official, was the manager of a port district that had been the subject of a state audit. The auditor's report became the basis of three "highly critical" stories in the defendant's newspaper.⁴⁶⁹ The plaintiff maintained that certain words in the series seriously exaggerated—to the point of falsity—the findings and characterizations of the auditor's report, and that the use of those words, coupled with evidence of ill will on the part of the newspaper, constituted actual malice.⁴⁷⁰

The high court cited the leading Supreme Court cases on libel, particularly with respect to state of mind and the plaintiff's burden in resisting a motion for summary judgment.⁴⁷¹ Having set forth the basic doctrine as all-controlling and having established a sense of the public plaintiff's legal vulnerability at the summary judgment stage of a libel action, the court analyzed the newspaper's use of clearly dramatic terms in reporting the results of the audit—words like "funneled"⁴⁷² and "misappropriated."⁴⁷³ The court's analysis was not wholly consistent. On the one hand, the court cited *Webster's Third New International Dictionary* for the literal (and innocent) meaning of "funnel"; on the other hand, the court acknowledged that both "funneled" and "misappropriation" had darker meanings as well.⁴⁷⁴ On the latter point, however, the court relied on *Sullivan* for the proposition that "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" are privileged absent actual

467. 760 P.2d 324, 16 Media L. Rep. (BNA) 1196 (Wash. 1988).

468. *Id.* at 325-26, 16 Media L. Rep. (BNA) at 1197-98.

469. *Id.* at 325, 16 Media L. Rep. (BNA) at 1197.

470. *Id.* at 328-29, 16 Media L. Rep. (BNA) at 1199-1200.

471. *Id.* at 326-27, 16 Media L. Rep. (BNA) at 1198-99. Like the *Gulf Publishing* court, see *supra* note 441 and accompanying text, the *Margoles* court noted the subjective nature of the actual malice inquiry and cited the same passage from *St. Amant*. *Margoles*, 760 P.2d at 327, 16 Media L. Rep. (BNA) at 1199 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

472. *Margoles*, 760 P.2d at 328, 16 Media L. Rep. (BNA) at 1200 ("At least \$12,750 was funneled to [the plaintiff] through [a private company], evidently by consent of the port commissioners.").

473. *Id.* at 329, 16 Media L. Rep. (BNA) at 1200 ("A final report by the state examiners contains a laundry list of irregularities and discrepancies in expense account vouchers and other payments to [the plaintiff]. It even states that he owes the port a refund of at least \$294 in misappropriated funds.").

474. *Id.* at 328-29, 16 Media L. Rep. (BNA) at 1200.

malice.⁴⁷⁵ The court decided that the newspaper's use of "funneled" and "misappropriated" "appear[ed] to be no more than a highly critical way of describing what the auditor's final report said."⁴⁷⁶ The combination of ill will and exaggeration of charges did not move the court to find a triable issue of fault.⁴⁷⁷

The court's permissive norm was clearly that a journalist's report of a critical document about a public office can go even further than the critical document itself—that a selection of words amounting to an exaggeration does not rob the report of good faith, even when coupled with spite or ill will. This decision ardently protects journalists when the creative process of writing is under fire. *Margoles*, therefore, is rigorously faithful to the meaning of *Sullivan*; it takes *Sullivan* seriously as law, that is, as requiring proof of mental state, and as insisting on "convincing clarity"⁴⁷⁸ of culpable mental state rather than behavior-influenced guesswork about the subjective requirement.

It is useful to compare the high court's law-oriented opinion and permissive norm with the lower appellate court's brief but quite different approach to the same facts. The appellate court disposed of the writing exaggerations with fact-oriented analysis. The court simply stated that "funneled" had been used "to describe a transaction whereby Port money was paid to a company for which Mr. Margoles worked and, in turn, received by Mr. Margoles in salary,"⁴⁷⁹ and that "misappropriated" had been used "to describe Mr. Margoles' acceptance of payments from one Port District while attending meetings and making a trip on behalf of another Port District."⁴⁸⁰ This comparison of the reporter's dramatic word choices to the less dramatic "facts" as understood by the court implied that the reporter's terms were false and could be considered intentionally or recklessly so. The appellate court's fact-oriented approach to writing therefore had the effect of setting a restrictive norm of accuracy, while the high court's opinion represented a permissive norm of good-faith writing produced by a law-oriented discussion.

As noted in the above discussion of research,⁴⁸¹ the difference between judicial approaches in *Margoles* suggests a difference in judi-

475. *Id.* at 329, 16 Media L. Rep. (BNA) at 1200 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

476. *Id.*

477. *Id.* at 330-31, 16 Media L. Rep. (BNA) at 1201-02.

478. *Sullivan*, 376 U.S. at 285-86.

479. *Margoles v. Hubbard*, 733 P.2d 554, 556, 13 Media L. Rep. (BNA) 2103, 2104 (Wash. Ct. App. 1987), *rev'd*, 760 P.2d 324 (Wash. 1988).

480. *Id.*

481. *See supra* text accompanying notes 460-66.

cial orientation. The fact-based approach represents a personal-injury "tort" approach; it emphasizes a duty of careful writing and measures compliance with the duty by referring to the seriousness of the risk of reputational harm. Although writing is at the very core of the compositional process, judges like those on the appellate bench in *Margoles* clearly do not shrink from penalizing slanted use of words; they recognize that words can do violence. The law-oriented approach represents a constitutional approach; it protects the liberty of overstated and vehement writing in the context of political debate. In the *Margoles* high court's law-oriented approach to journalistic writing, the selection of words becomes the intellectual core of political participation. The liberty to inform the public expressively, rather than the duty of care to the person criticized, becomes the central judicial concern.

Finally, the permissive norm that emerged in the high court's opinion was different from the permissive norm established in *Gulf Publishing*, a standard of conduct just within the bounds of acceptability. In *Margoles*, the high court stressed that the conduct at issue was well within the mainstream of acceptable journalism. The newspaper's choice of words amounted to "no more than a highly critical way of describing what the auditor's final report said," and the challenged articles were a "far cry" from presenting any legal problem.⁴⁸² The court underlined the acceptability of the press's caustic summary of the auditor's report: "We fail to see anything in the record which establishes that the word 'funneled' in this context is even false."⁴⁸³ The permissive norm in *Margoles*, then, was characterized as consistent with both good-faith journalism *and* good journalism, whereas the permissive norm in *Gulf Publishing* was characterized as consistent with good-faith journalism but as falling short of the professionalism that the court associated with good journalism.

3. Discussions of Editing

In *Hotchner v. Castillo-Puche*,⁴⁸⁴ the United States Court of Appeals for the Second Circuit reversed a jury verdict of over \$100,000 for a public-figure plaintiff against Doubleday & Company and the author of a non-fiction book about Ernest Hemingway.⁴⁸⁵ The book contained a number of "very uncomplimentary references" to the per-

482. *Margoles*, 760 P.2d at 329-30, 16 Media L. Rep. (BNA) at 1200-01.

483. *Id.* at 328, 16 Media L. Rep. (BNA) at 1200.

484. 551 F.2d 910, 2 Media L. Rep. (BNA) 1545 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).

485. *Id.* at 911, 2 Media L. Rep. (BNA) at 1545.

sonality of the plaintiff, an acquaintance of Hemingway, and seemed to be based on the author's personal knowledge and observations.⁴⁸⁶ In addition, the book attributed to Hemingway the statement: "I don't really trust [the plaintiff]." ⁴⁸⁷

The plaintiff argued that Doubleday "had cause seriously to suspect that [the author's] opinions of [the plaintiff] were without foundation," necessitating independent verification by Doubleday.⁴⁸⁸ In addition, the plaintiff argued that Doubleday had cause to doubt the book's truth because of the author's apparent hostility to the plaintiff; that because passages of the book were incapable of independent verification, Doubleday doubted their truth; and that Doubleday's editing of the Hemingway quotation indicated reckless disregard of the truth.⁴⁸⁹

The *Hotchner* court reviewed the Supreme Court's libel cases and drew the following conclusions:

These strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech.⁴⁹⁰

This language faithfully captured *Sullivan's* insistence on favoring expression in close cases, on accepting the sometimes "harsh results" of the *Sullivan* test, and on remaining attentive to the larger concern of libel law: preserving a margin of error for debate on matters of public concern.⁴⁹¹

This emphasis on the legal standard marked the court's treatment of the facts and its elaboration of permissive standards for editors. The court noted that Doubleday had no cause to doubt that its author had a first-hand basis for the defamatory statement made about the plaintiff. Doubleday could properly rely on photographs that placed Hemingway with both the author and the plaintiff. Doubleday could

486. *Id.* at 911-12, 2 Media L. Rep. (BNA) at 1545-46.

487. *Id.* at 912, 2 Media L. Rep. (BNA) at 1546.

488. *Id.* at 914, 2 Media L. Rep. (BNA) at 1547.

489. *Id.* at 913-14, 2 Media L. Rep. (BNA) at 1547-48.

490. *Id.* at 913, 2 Media L. Rep. (BNA) at 1547.

491. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-73 (1964).

also properly rely on its author's reputation as a writer and the reputation of a Spanish publisher that originally published the book.⁴⁹² Editors and publishers may rely in good faith on writers who have a publishing career with no known blemishes.⁴⁹³

The court added that a publisher's or editor's knowledge of a writer's "ill will" does not "by itself prove knowledge of probable falsity," that is, the book's unflattering references to the plaintiff, while signalling the author's low regard, does not present a "red flag" necessitating editorial verification.⁴⁹⁴ Editors need not assume that an author's belligerence or lack of objectivity indicate a lack of truthfulness. In addition, the court recognized editorial freedom to publish even if a passage is "incapable of independent verification," as long as "there are no convincing indicia of unreliability."⁴⁹⁵ An author's hostility apparently is not a "convincing" sign of unreliability. Finally, editorial alteration of a quotation, although amounting to "fictionalizing to some extent," is acceptable so long as the "defamatory impact" has not been changed.⁴⁹⁶

The *Hotchner* court thus provided considerable leeway to editors and publishers. A law-oriented approach led to permissive norms that, like those in *Gulf Publishing*⁴⁹⁷ and *Margoles*,⁴⁹⁸ were faithful to *Sullivan's* protection of all expression but the clearly culpable.⁴⁹⁹ Like those cases, the *Hotchner* court reversed a lower court decision in a tone that sought to correct any impulse to let questionable trials proceed beyond the phase of a motion for summary judgment or directed verdict.

E. Judicial Choice of Emphasis of One Behavioral Category Over Another

As stated in the previous section, different modes of analysis can appear at different levels of court action in the same case. Thus, an intermediate court may take a fact-oriented approach to research conduct, while a high court may take a law-oriented approach to the same conduct. Another way in which courts can differ from each other in

492. *Hotchner*, 551 F.2d at 913, 2 Media L. Rep. (BNA) at 1547.

493. *Id.*

494. *Id.* at 914, 2 Media L. Rep. (BNA) at 1547.

495. *Id.*, 2 Media L. Rep. (BNA) at 1547-48.

496. *Id.*, 2 Media L. Rep. (BNA) at 1548.

497. See *supra* note 449 and accompanying text.

498. See *supra* notes 461-77 and accompanying text.

499. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (stating that plaintiffs must prove actual malice with convincing clarity).

libel adjudication is in the choice of emphasis of one behavioral category over another.

Libel opinions involving public plaintiffs almost uniformly involve two, three, or more journalistic behaviors, as plaintiffs seek to accumulate sufficient indicia of actual malice to survive motions for summary judgment or directed verdict. These combinations of behaviors depend, of course, on the facts of the individual cases, perceptions of past successful combinations, and the attorney's prowess at casting a case into a successful mold. Professor Bloom has written extensively on the sorts of combinations that can amount to clear and convincing evidence of actual malice.⁵⁰⁰

Combinations of behaviors are important for another reason. Courts sometimes emphasize one sort of behavior rather than another, and the emphasis will facilitate the disposition of the case. For example, in a case involving issues of both writing and research, a court may decide to dispose of the case by seeing it as essentially a "writing case," adopting a law-oriented approach, and adopting or following a permissive norm of writing. Another court might decide to stress the research component, adopting a fact-oriented approach and deciding the case with a restrictive norm of research. Similarly, in cases involving issues of editing and research, a court might stress the "editing" behavior and opt for a law-oriented approach with a permissive norm, or stress research and conduct a fact-oriented discussion with a restrictive norm.

The following discussion provides examples of writing and research cases first,⁵⁰¹ and then an editing and research case,⁵⁰² showing how emphasis can be all-important. As will be seen, a fact-oriented focus on research can be a way to find for a plaintiff, while a law-oriented focus on editing or writing generally favors the defendant. A law-oriented research approach is, of course, entirely possible and a defendant can be expected to profit from it; the following discussion, however, is devoted to the choice between a fact-oriented research approach and a law-oriented approach to either writing or editing.

1. Writing Emphasized Over Research

In *Fremont Energy v. Seattle Post-Intelligencer*,⁵⁰³ a federal trial judge granted a newspaper's motion for summary judgment in a libel

500. See generally Bloom, *supra* note 17 (discussing proof requirements for defamation litigation).

501. See *infra* notes 503-31 and accompanying text.

502. See *infra* notes 532-55 and accompanying text.

503. 9 Media L. Rep. (BNA) 1569 (W.D. Wash. 1982).

suit brought by a public-figure corporate plaintiff and its principal.⁵⁰⁴ The newspaper published that Fremont Energy “used to be known” under a different corporate name and that “several principals” of that former corporation had been sentenced to jail for securities fraud in 1975.⁵⁰⁵ The plaintiffs claimed that the story was factually wrong: Only two of the former corporation’s principals, not “several,” had been convicted and sentenced and at the time of their sentencing they were not principals of the former corporation.⁵⁰⁶ The plaintiffs also complained that the story gave the false impression that several officers of the successor corporation, Fremont, were the same individuals who were sentenced to jail for securities fraud in 1975.⁵⁰⁷

The plaintiffs sought to prove actual malice in part by pointing to the reporter’s admitted doubts about the completeness of his research. A memorandum was unearthed in which the had reporter “told his superiors that he did not know whether the individuals who were [convicted in 1975] were officers or directors of Fremont.”⁵⁰⁸ The reporter had “asked [the newspaper] to pay his expenses to fly to Los Angeles in order to conduct a further investigation.”⁵⁰⁹ The court stated that “[t]he newspaper apparently declined that request.”⁵¹⁰

The court next found that the reporter’s “failure to investigate” the identities of the convicted persons “does not constitute actual malice”—not because the investigation was adequate in the eyes of the court or because the non-pursuit of additional information did not smack of “serious doubt,” but for reasons relating to the way in which the story was written.⁵¹¹ In other words, the court essentially dropped the plaintiffs’ line of argument concerning research and instead focused on the language of the article. That focus proved beneficial to the defendant. The court referred to *Webster’s Third New International Dictionary, Unabridged* for the definition of “several,” finding its meaning to be “more than one,” and concluded that the story was thus “not inaccurate.”⁵¹² As for the rest of the article, the court found that it was “[a]t most . . . arguably misleading” in that “a reader could believe” that it alleged that some present officers of the plaintiff cor-

504. *Id.* at 1574.

505. *Id.* at 1573.

506. *Id.*

507. *Id.*

508. *Id.* at 1574.

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

poration had criminal records.⁵¹³ The court's own choice of words demonstrated a lack of sympathy for any argument of the plaintiff based on the reporter's written product; regardless of what "a reader could believe," the court clearly preferred a literal reading that would cast no doubt on the defendant's good faith. Citing the law-oriented passage from *St. Amant*, the court concluded that there was no evidence that the article had been written with actual malice.⁵¹⁴

The court addressed the plaintiff's claim of suspect research in one conclusory sentence: "[N]o evidence comes even near" to meeting the requirement of "clear and convincing" evidence of fault at the time of publication.⁵¹⁵ It next examined another sentence from the story in an equally literal fashion, avoiding any recognition of the plaintiff's claim that subtle word choice left another false impression. Again, the court adopted a law-oriented focus—that no reasonable jury could find actual malice on the basis of the article's mode of expression—rather than considering research arguments that may have been raised.⁵¹⁶

In the *Fremont* case, then, we see a court choosing to focus on and articulate a First Amendment-based solicitude for the freedom of writing as a creative process, rather than a tort-based concern for a duty of responsible research. The court's first step, its apparent classification of the case as a "writing" case, paved the way for all that followed: a *St. Amant*-based discussion applying a permissive writing norm on the acceptability of literalistic writing, rather than a fact-based discussion applying a restrictive norm on the unacceptability of concededly incomplete research.

2. Research Emphasized Over Writing

In *Nash v. Keene Publishing Corp.*,⁵¹⁷ the New Hampshire Supreme Court took an approach almost opposite to the *Fremont* court's approach. The court in *Nash* reversed a grant of summary judgment for the defendant newspaper.⁵¹⁸ The plaintiff asked the court to focus on the newspaper's research and, in effect, to adopt a restrictive norm requiring additional research when a newspaper receives information from an obviously suspect source.⁵¹⁹ The defend-

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.*

517. 498 A.2d 348, 12 Media L. Rep. (BNA) 1025 (N.H. 1985).

518. *Id.* at 349, 12 Media L. Rep. (BNA) at 1025.

519. *Id.* at 355, 12 Media L. Rep. (BNA) at 1030.

ant asked the court to focus on the writing in question and, in effect, to adopt a permissive norm allowing short hyperbolic articles containing some factual assertions to be treated as fundamentally hyperbolic and hence entirely privileged.⁵²⁰

The plaintiff, a policeman, arrested a motorist for driving under the influence.⁵²¹ The incensed driver later wrote a letter about the policeman which the defendant newspaper published in its Letters to the Editor section.⁵²² In addition to an angry, sarcastic tone, the letter contained a number of personal attacks and a statement that the city attorney "has numerous complaints on the matter of [the plaintiff]."⁵²³ An editor accepted the "scrawled, handwritten" letter "containing profanity" from the driver, who "[had come] to the paper in an agitated state" the day after the alleged incident.⁵²⁴ The editor's "research" consisted of telephoning the city attorney who said that the policeman had been the subject of just one complaint—from the driver. The editor sought no verification of the other charges in the letter and published it.⁵²⁵ An "editor's note" published beneath the letter noted the city attorney's denial that other complaints had been made about the policeman.⁵²⁶ A "Letters Policy" on the same page said: "The readers' column is for your opinions. . . . [W]e do not publish letters we feel to be libelous . . . or to make allegations we are unable to verify independently."⁵²⁷

The court declined to adopt the defendant's view of the case. The court focused on statements in the letter that it considered a jury could find factual and remained silent on the letter's context and consistently hyperbolic tone.⁵²⁸ If the court had seen the case as principally about context, word choice, and meaning—in short, about writing—it could have given weight to the accompanying "Letters Policy" which said that "the readers' column is for your opinions."⁵²⁹ In addition, it could have given weight to the letter's internal hyperbolic

520. *Id.* at 352, 12 Media L. Rep. (BNA) at 1027.

521. *Id.* at 350, 12 Media L. Rep. (BNA) at 1025.

522. *Id.*, 12 Media L. Rep. (BNA) at 1025-26.

523. *Id.*, 12 Media L. Rep. (BNA) at 1025.

524. *Id.*

525. *Id.*

526. *Id.* at 350-51, 12 Media L. Rep. (BNA) at 1026.

527. *Id.* at 351, 12 Media L. Rep. (BNA) at 1026.

528. *Id.* at 352, 12 Media L. Rep. (BNA) at 1027.

529. *Id.*

context within which the seemingly factual statements lost much of their identifiably factual character.⁵³⁰

For the court, however, the case was far more about the appropriate level of verification of information obtained from a suspect source. In a detailed, fact-laden discussion, the court noted distinct signs of a suspect source: agitation, scrawled penmanship, profanity, omission of detrimental facts, proven inaccuracy of one assertion, implausibility of another.⁵³¹ In reversing summary judgment for the newspaper on this basis, the court implicitly adopted a restrictive norm of research—a duty to verify further when a previously untested source's appearance, manner, speech, and plausibility would send danger signals to a reasonable reporter. By emphasizing the research issue rather than the writing issue, the court chose duty analysis over liberty analysis, tort over First Amendment, deterrence over "breathing space."

3. Research Emphasized Over Editing

In *Reuber v. Food Chemical News, Inc.*,⁵³² a panel of the United States Court of Appeals for the Fourth Circuit undertook a fact-oriented emphasis on research which led to the use of an implied restrictive norm to affirm a jury verdict against the press defendant.⁵³³ However, when the case was reheard *en banc*, the court engaged in a law-oriented emphasis on editing which led to the use of a permissive norm to reverse the verdict.⁵³⁴

The public-figure plaintiff in *Reuber* was a scientist with a research firm on contract with a public agency, the National Cancer Institute (NCI). "On his own time," the plaintiff conducted research into likely carcinogens and wrote papers that he circulated privately.⁵³⁵ One manuscript contained his office address and the names of his employer and the NCI, thus "creat[ing] confusion" over whether his views were the official views of the NCI. The confusion provoked a "scathing letter" of reprimand from his boss, accusing the plaintiff of detailed "professional misconduct."⁵³⁶ This letter was

530. *Nash* predates *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Supreme Court's recent pronouncement on the place of "opinion" in libel doctrine. See *supra* note 364.

531. *Nash*, 498 A.2d at 355, 12 Media L. Rep. (BNA) at 1030.

532. 899 F.2d 271, 17 Media L. Rep. (BNA) 1537 (4th Cir.), *vacated*, 922 F.2d 197 (4th Cir. 1990) (en banc), *reh'g*, 925 F.2d 703, 18 Media L. Rep. (BNA) 1689 (4th Cir.) (en banc) [hereinafter *Reuber I*], *cert. denied*, 501 U.S. 1212 (1991).

533. *Id.* at 279, 17 Media L. Rep. (BNA) at 1542.

534. *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 712-14, 18 Media L. Rep. (BNA) 1689, 1695-97 (4th Cir. 1991) (en banc) [hereinafter *Reuber II*].

535. *Reuber I*, 899 F.2d at 275, 17 Media L. Rep. (BNA) at 1538.

536. *Id.* at 275, 17 Media L. Rep. (BNA) at 1539.

leaked to the editor of a chemical association newsletter, who published "most of the contents" of the letter and an article about it.⁵³⁷ In the editor's words, the decision to publish included a "conscious decision not to inquire into whether the statements contained in [the letter] were true or false."⁵³⁸ A jury later found that the letter and article contained false statements.⁵³⁹

The three-judge appellate panel affirmed a libel verdict against the newsletter. The media defendant had cast the case in part as involving a broad freedom of editors to publish matters pertaining to the public interest; specifically, the defendant argued that the editor's treatment of the leaked letter was protected by a privilege of "fair report" of official actions.⁵⁴⁰ The plaintiff, however, characterized the case as a research case involving a duty to verify questionable factual information in confidential correspondence before publishing.⁵⁴¹

The panel adopted the plaintiff's characterization, emphasizing the newsletter's paucity of research and relegating comments about editorial privilege largely to a footnote.⁵⁴² The panel stated that "[t]he editor of the [newsletter] took no steps to ascertain the accuracy of the letter."⁵⁴³ All that was known to the editor was that

someone in the chemical industry, with a vested interest in discrediting [the plaintiff], claimed to have received the letter from an anonymous source. Despite the fact that it was the

537. *Id.* at 275-76, 17 Media L. Rep. (BNA) at 1539.

538. *Id.* at 275, 17 Media L. Rep. (BNA) at 1539.

539. *Id.* at 277, 17 Media L. Rep. (BNA) at 1540.

540. *Id.* at 280-81, 17 Media L. Rep. (BNA) at 1543-44. The "fair report" privilege is "an exception to the common-law rule that the republisher of a defamation was subject to liability similar to that risked by the original defamer." *Medico v. Time, Inc.*, 643 F.2d 134, 137, 6 Media L. Rep. (BNA) 2529, 2531 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981). The privilege thus enables the news media to "publish accounts of official proceedings or reports even when these contain defamatory statements." *Id.* at 137, 6 Media L. Rep. (BNA) at 2531-32. The *Restatement (Second) of Torts* provides this formulation: "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." *RESTATEMENT (SECOND) OF TORTS* § 611 (1977). The *Medico* court identified three rationales for the privilege: it enables the one who attends a public proceeding to inform members of the public of what took place; it facilitates public supervision of official proceedings; and it serves the general public interest in learning of important matters. *Medico*, 643 F.2d at 141-43, 6 Media L. Rep. (BNA) at 2534-36. See generally SACK & BARON, *supra* note 78, §§ 6.3.2.2-6.3.2.3, at 370-90 (1994) (discussing the fair report privilege). The question in *Reuber* was whether the fair report privilege should apply to the publication of the contents of the reprimand letter concerning the plaintiff's research activities. *Reuber I*, 899 F.2d at 280 n.17, 17 Media L. Rep. (BNA) at 1543 n.17.

541. *Reuber I*, 899 F.2d at 279-80, 17 Media L. Rep. (BNA) at 1542-43.

542. *Id.* at 280-81 n.17, 17 Media L. Rep. (BNA) at 1543-44 n.17.

543. *Id.* at 279, 17 Media L. Rep. (BNA) at 1542.

most severe letter of reprimand that [the editor] had ever seen, she did not telephone [the plaintiff] to get his response or even call [the writer of the letter] to verify that he had actually written such a letter. . . . [The editor] also testified that she could have published the letter even though persuaded that several or all of the statements in it were false.⁵⁴⁴

The court found that the editor "had wholly abandoned all responsibility for accurately reporting the news."⁵⁴⁵

For the panel, the crux of the case was the editor's lack of commitment to researching the story. While the panel cited legal authorities, its essential analysis was fact-oriented, yielding a restrictive norm: Editors must insist on some minimal affirmative checking of serious factual allegations contained in private materials leaked by interested parties.

4. Editing Emphasized Over Research

In the Fourth Circuit's opinion issued after rehearing *en banc*,⁵⁴⁶ however, a quite different emphasis is apparent. The court focused broadly on the editor's protected discretion to select information to publish, rather than narrowly on the research steps taken. The court first recognized the applicability of the fair report privilege to the case.⁵⁴⁷ While the reprimand letter was written by a private employer to an employee, the court noted the connection of the employer to a public agency, the National Cancer Institute, and the fact that the employer's letter "invoked the power and the prestige" of the agency.⁵⁴⁸ The court suggested that the defendant, in effect, had reported on quasi-official action. The court stressed that the underlying rationales for the fair report privilege applied when, as in *Reuber I*, the editor provided information to assist citizens in monitoring government as well as information about a public controversy.⁵⁴⁹ By ruling that the privilege applied in this attenuated context, the court indicated that an editor's decision to publish a government-related letter and story

544. *Id.* at 279-80, 17 Media L. Rep. (BNA) at 1542-43.

545. *Id.* at 280, 17 Media L. Rep. (BNA) at 1543.

546. *Reuber I*, 925 F.2d 703, 18 Media L. Rep. (BNA) 1689 (4th Cir.) (en banc), *cert. denied*, 501 U.S. 1212 (1991).

547. *Id.* at 712, 18 Media L. Rep. (BNA) at 1695.

548. *Reuber II*, 925 F.2d at 713, 18 Media L. Rep. (BNA) at 1696 (quoting *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984)).

549. The court stated: "[The letter] provides citizens with information they need to evaluate how the carcinogenic properties of various chemicals are determined and, by extension, how an important government agency, the NCI, is waging war against cancer." *Reuber II*, 925 F.2d at 713, 18 Media L. Rep. (BNA) at 1697.

without verification of defamatory facts is a core journalistic behavior protected by the First Amendment.

The court showed little concern about research. It disassembled the component aspects of the research issue and declared each separate part insignificant.⁵⁵⁰ For example, the most troubling evidence—the editor’s testimony that she made a “conscious decision not to inquire into the truth or falsity” of the letter’s allegations—was said to be non-dispositive.⁵⁵¹ The court stressed its own assessment that there was “no apparent reason to question the truthfulness” of the letter.⁵⁵² In the midst of numerous citations to *St. Amant* and other precedent, the court dismissed other evidence as “murky” and “remote.”⁵⁵³ The court concluded with the permissive norm that an editor has no duty to “parse” information “in detail” even when the information appears to conflict with itself in part and has been obtained from interested parties through a leak, especially when delay of the story would deprive readers of a “timely report.”⁵⁵⁴

The court’s emphasis on editing over research amounted to a broad solicitude for behavior perceived to be at the core of journalism, namely, the editor’s liberty to select and publish material about public issues and government in the role of public watchdog.⁵⁵⁵ Thus, the panel and *en banc* opinions reflect a basic difference in orientation and emphasis, a difference in methodology, and, of course, a difference in the substantive content of the journalistic norm deemed relevant to the case.

III. CONCLUSIONS

This study has examined two aspects of judicial application of the actual malice rule. First, we chronicled the range of journalistic behaviors examined by judges in libel opinions.⁵⁵⁶ Second, we analyzed how courts treat journalistic behaviors in a selection of cases.⁵⁵⁷ In these cases, we looked at how various modes of judicial treatment can

550. *Id.* at 716-17, 18 Media L. Rep. (BNA) at 1699-1700.

551. *Id.* at 716, 18 Media L. Rep. (BNA) at 1699.

552. *Id.*

553. *Id.* at 717, 18 Media L. Rep. (BNA) at 1699-1700.

554. *Id.* at 717-18, 18 Media L. Rep. (BNA) at 1700-01.

555. *Id.* at 718, 18 Media L. Rep. (BNA) at 1701. One problem with the decision was that, in a sense, the editor did not choose at all; she was conduit for information. By slighting the significance of research, the court may have undercut to some extent its own rationale that the purpose of protecting the press is to protect informed intellectual activity.

556. See *supra* notes 83-290 and accompanying text.

557. See *supra* notes 291-555 and accompanying text.

result in explicit or implicit statements of professional standards for journalists.

The study leads to four principal conclusions:

A. Libel law today is working contrary to the spirit of *New York Times Co. v. Sullivan*,⁵⁵⁸

B. While the development of standards in libel law is inconsistent with *Sullivan*, the essential dynamic at work is familiar in the common law and should not be surprising,⁵⁵⁹

C. The norms identified in this study reflect greater judicial willingness to be restrictive in the objective category of research behavior than in the subjective or "compositional" realms of writing and editing,⁵⁶⁰ and

D. Judicial discretion to emphasize one sort of behavior over another in a given case allows judges considerable, indeed strategic, flexibility to decide cases the way they want to decide them.⁵⁶¹

We discuss these conclusions next. Then we address the implications of these conclusions for the profession of journalism and for libel law.⁵⁶²

A. *Libel Law and the Spirit of Sullivan*

The study suggests that the actual malice privilege is functioning in a way that, while technically consistent with *New York Times Co. v. Sullivan*,⁵⁶³ is contrary to *Sullivan*'s fundamental design. *Sullivan* did more than announce a new "federal rule" for public-official plaintiffs in libel actions. It fashioned the rule as a means to an end. That end was a sharp reduction in the universe of defendants who would be subject to libel suits by public officials. The Court signalled this objective in several ways: conceptually, doctrinally, and in its application of the new doctrine.

First, the Court conceptualized the case in a way that lent great cultural symbolism to the work of the press and indicated that liability should be exceedingly rare. The Court recalled the origins of American democracy, harkening back to the founding principles of the republic.⁵⁶⁴ It viewed the case not simply as a libel action in which one of the defendants happened to be a newspaper, but as a dispute in-

558. See *infra* part III.A.

559. See *infra* part III.B.

560. See *infra* part III.C.

561. See *infra* part III.D.

562. See *infra* part IV.

563. 376 U.S. 254 (1964).

564. *Id.* at 270-77.

volving "freedom of expression upon public questions."⁵⁶⁵ Citing Justice Brandeis's eloquent concurrence in *Whitney v. California*,⁵⁶⁶ the Court invoked "a fundamental principle of American government" that "public discussion is a political duty."⁵⁶⁷ The Court then suggested that protection of "free public discussion of the stewardship of public officials" was fundamental to American government.⁵⁶⁸ In addition, it equated the press defendant with the "citizen-critic of government,"⁵⁶⁹ even though the *Times's* challenged "criticism" was not an editorial or a news story but a paid advertisement for which the *Times* was legally responsible only through the "republication" principle of defamation law.⁵⁷⁰ The thrust of the Court's decision was to conceptualize the media defendant as a commentator whose good-faith fulfillment of a political duty demands protection even when it publishes false, defamatory material. The Court thus established a context in which the reach of the libel action would be greatly limited.

Second, the Court fashioned a rule that would achieve the reduction of libel defendants doctrinally. Seeking to provide increased protection to citizen critics, yet not willing to countenance a role for lies in political debate, the Court created a rule that would be a test for bad faith.⁵⁷¹ The practical effect of the test would be to narrow the range of primary inquiry in public-official libel litigation, from traditional questions of truth and the defamatory character of the challenged statement, to proof of state of mind. Faced with this narrowed but onerous new inquiry, plaintiffs would be discouraged from suing in the first place. For those who persisted, the requirement that state of mind be proven with "convincing clarity"⁵⁷² would diminish the chances of prevailing.

Third, the Court supplemented its conceptual and doctrinal efforts by applying the new test in a way that would support the larger goal. Through a cursory application of the actual malice test to the facts of *Sullivan*, the Court signalled that the inquiry into whether a defendant lied would not be particularly searching,⁵⁷³ that is, that the courts would not readily infer the requisite state of mind from objec-

565. *Id.* at 269.

566. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

567. *Sullivan*, 376 U.S. at 270 (citing *Whitney*, 274 U.S. at 375-76.)

568. *Id.* at 273, 275.

569. *Id.* at 282.

570. See SACK & BARON, *supra* note 78, § 6.1, at 362 n.9.

571. *Sullivan*, 376 U.S. at 279-80.

572. *Id.* at 285-86.

573. See *supra* notes 25-30 and accompanying text.

tive evidence. Would-be plaintiffs would, therefore, have an additional reason to doubt the utility of filing suit.

Thus, the spirit of the *Sullivan* decision was to limit the universe of speakers and publishers for whom libel litigation would be a threat. The limitation took the form of a new privilege that would deter plaintiffs by concentrating the scope of legal inquiry to proof of mental state. In addition, the limitation would be perfected by judicial application of the privilege in a way that would discourage public plaintiffs from suing in the first place.

In operation, however, the rule appears to have had a different effect. While the spirit of *Sullivan* was to confine tort exposure to defendants who were liars, it later became clear that this goal would be difficult, if not impossible, to achieve through the means chosen by the Court. As Justice Black predicted,⁵⁷⁴ absent an *absolute* privilege for factual error, many plaintiffs were not deterred from suing the media, even with a *prima facie* case that now included a requirement that fault be proven with convincing clarity. After all, presumed and punitive damages remained available; juries were suspected of being sympathetic toward plaintiffs suing corporate defendants; jury (and judicial) understanding of the difference between subjective and objective tests of fault was not likely; and, in the late 1970s, the public's Watergate-era faith in the power of the press had waned.⁵⁷⁵ Perhaps *Sullivan* relied too heavily on the effectiveness of the actual malice privilege as an instrument of its larger objective. A perceptible reduction in the universe of media defendants did not occur.

Moreover, instead of narrowing the inquiry to evidence that plaintiffs would likely be unable to produce, the actual malice rule has had the opposite effect. Virtually any conduct related to the research, writing, or editing of the challenged material is relevant to the issue of state of mind,⁵⁷⁶ and plaintiffs use discovery to unearth newsroom conversations, internal memoranda, and other evidence of the publication process.⁵⁷⁷ Judicial discussion of a wide range of press behavior has become commonplace,⁵⁷⁸ arguably in excess of the press-protective design of *Sullivan*.

574. *Sullivan*, 376 U.S. at 293-97 (Black, J., concurring).

575. See generally SMOLLA, *SUING THE PRESS*, *supra* note 385, at 9-15 (1986) (discussing Americans' loss of faith in the press).

576. See *supra* notes 91-95 and accompanying text.

577. See, e.g., *Tavoulareas v. Piro*, 817 F.2d 762, 793-97, 13 Media L. Rep. (BNA) 2377, 2401-04 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987).

578. See, e.g., *id.*; *Sharon v. Time, Inc.*, 599 F. Supp. 538, 567-81, 11 Media L. Rep. (BNA) 1153, 1175-87 (S.D.N.Y. 1984).

Of course, no one doubts that under *Sullivan* and *Herbert v. Lando*,⁵⁷⁹ circumstantial evidence of behavior may be probative of state of mind; a trier of fact properly may draw an inference of actual malice from objective facts about a journalist's performance. However, while attention to performance is logically permissible, the rigor of that attention in a particular case and the comprehensiveness of that attention over time are inconsistent with the spirit of *Sullivan*. The cases in this study make clear that courts are analyzing a breathtaking array of journalistic conduct in the course of inquiring into state of mind. These evaluations are becoming guides for future compliance. Editors, lawyers, and scholars make lists of behaviors that have been legally acceptable and those that have not.⁵⁸⁰ Perceived rules of legal acceptability transform into norms of journalistic acceptability, resulting in a system that is a far cry from, yet a product of, *Sullivan* itself.

Finally, *Sullivan*'s cursory application of the actual malice test, attending very little to the conduct offered as evidence, clearly has not been followed. The present study found judicial discussions that were typically far more detailed than the discussion in *Sullivan*.⁵⁸¹ Despite their statistically poor chances of prevailing in a suit against the press, many public plaintiffs appear to believe that filing suit is worth the effort.⁵⁸² Some will be able to gather and present detailed facts of media performance for close scrutiny by a court and jury.

In sum, the objective of the Court in 1964 has not come to pass. Suits are prevalent, the inquiry is broad, and courts look closely at the plaintiff's evidence and discuss it in decisions with far-reaching impact.

B. *The Dynamic of Standards Development: In Part Familiar, In Part Novel*

A second conclusion involves the common-law dynamic discerned in the present study. This dynamic has two parts. First, in order to prove intent or reckless disregard on the part of defendants, plaintiffs are permitted to offer circumstantial proof in the form of evidence of objective behavior. Second, courts (mostly appellate) discuss the objective behavior presented at trial. While these discussions

579. 441 U.S. 153, 169 (1979) (declining to recognize a First Amendment-based privilege against responding to a libel plaintiff's inquiries about relevant aspects of the editorial process).

580. See, e.g., SMOLLA, LAW OF DEFAMATION, *supra* note 17, §§ 3.17-3.23; SANFORD, *supra* note 17, § 8.4.

581. See, e.g., *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 670-85, 690-93 (1989).

582. See BEZANSON ET AL., *supra* note 10, at 177-81.

in a formal sense are about whether the requisite mental state has been proven, this study suggests that the discussions produce statements that can take on a life of their own, as behavioral norms for journalists.

The first part of the dynamic is not surprising to discover, nor is it inherently disturbing. In the law of torts, when the standard of fault is intent or recklessness, common-law tradition teaches that both litigation and judicial review will focus on objective indicia. As Professor Keeton wrote long ago about proof of the tort of misrepresentation, "it would be monstrous to require direct proof or something in the nature of an admission of bad faith."⁵⁸³

Both surprising and disturbing, however, is what happens in the second part of this dynamic—the judicial discussions of press conduct. Particularly troubling are the range and specificity of such discussions in particular cases, the use of such discussions as precedents, and the susceptibility of such discussions to interpretation by journalists as declaring or implying behavioral norms. Moreover, because the courts appear largely unaware of the norm creation in which they are engaging, the danger is that their work is ill conceived or simply uninformed. Even when norms emerging from the judicial process present no substantive problems, this activity represents an intolerable intrusion of the judiciary into the American press by creating a *de facto* regulatory system for press behavior.

Some may object that this judicial intrusion is a positive development because law *should* check the powerful institution of the press. But an interest in providing a check on the media does not necessarily require continuation of the current libel system. When examined comprehensively, that system appears much more problematic in its interference and entanglement with press freedom than previously acknowledged. A check on the press may be necessary or inevitable, but the breadth of the current system's intrusion, as demonstrated in this study, is indefensible.

C. *Research Cases and Restrictive Norms*

A third conclusion concerns the norms themselves, specifically the nature of judicial involvement with respect to the three behavioral categories studied and the degree of judicial intrusiveness in each.

Nature of Judicial Involvement. In judicial statements about press behavior in libel decisions, courts are creating two sorts of norms: re-

583. Page Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 U.C.L.A. L. REV. 583, 584 (1958).

strictive norms and permissive norms. Restrictive norms limit the range of professional discretion for journalists. These norms arise in two ways. One way is through a clear-cut or strongly implied judicial statement of fact or law about press behavior in an opinion signalling the court's perception that it is dealing with egregious conduct.⁵⁸⁴ A second way is through implication in an opinion in which the court is making factual statements about press behavior, usually in the context of denying a press defendant's motion for summary judgment.⁵⁸⁵

Permissive norms amount to a set of freedoms for journalists. These arise in judicial statements about the meaning of *Sullivan* and its progeny in the context of a particular case, specifically about whether the press behavior in question is probative of actual malice.⁵⁸⁶

Degree of Judicial Involvement. An additional conclusion that can be drawn from the cases examined in Part II is that courts more often made restrictive norms, and held for plaintiffs, in research cases than in writing and editing cases.⁵⁸⁷ One explanation for this different treatment simply may be comfort level, in the sense that courts may see research cases as involving a kind of activity more amenable to judicial treatment than writing and editing. Courts may view research cases as involving the objective action of gathering information, while writing and editing cases involve speech itself, that is, the compositional enterprise, the more purely creative and subjective process of selecting and revising words.⁵⁸⁸

A second explanation for less judicial restrictiveness in the writing and editing cases of Part II than in the research cases may be that judges more easily identify with journalists as writers and editors than with journalists as researchers. Judges write every day. As writers and editors themselves, many become intimately familiar with some of the fundamental problems of authorship: the ease with which lan-

584. See *supra* notes 311-96 and accompanying text.

585. See *supra* notes 397-430 and accompanying text.

586. See *supra* notes 431-99 and accompanying text.

587. See *supra* notes 432-33 and accompanying text.

588. Perhaps a subconscious analogy is made to the action/speech dichotomy in First Amendment jurisprudence, and to the notion that while action is subject to varieties of regulation, speech is for the most part sacrosanct. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 8-9 (1970) (discussing the expression/action dichotomy). But see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 24-27 (1992) (criticizing the expression/action dichotomy). Research behavior thus would appear more "touchable" by courts than the compositional behaviors of writing and editing. Courts, then, might find that a dichotomy between research and writing/editing cases creates a certain decisional comfort level, which may be a function of judicial experience with the action/speech dichotomy in First Amendment law generally.

guage can assume a life of its own; the constant possibility that a text will be given an interpretation that was not intended, even when carefully edited; the inadequacy of language itself to express an idea. A certain amount of solicitude for journalistic writing and editing thus may be a function of judicial appreciation for the delicacy of compositional behaviors that courts have in common with the press.

Of course, judges conduct research as well. However, American lawyers are trained that legal research is either correct or it is not, an attitude that surely continues in the judiciary. The courts' greater readiness to find fault with journalistic research may be related to their insistence on correct legal research.

Yet, in their greater tendency to take a restrictive approach to research than to writing and editing, courts may be missing an opportunity to be more faithful to *Sullivan*. Actual malice, after all, is the test, and it refers to mental state. Perhaps actual malice is more easily and reliably inferred from a defendant's selection of words, emphasis, exaggeration, and the like, than from evidence of inadequate research techniques. Arguably the language used in a news story is more closely derived from, or related to, the mental state of the writer than the number of sources he checked or whether he consulted "obvious" sources before he wrote the story. Nevertheless, the cases examined in Part II suggest that courts are more likely to make restrictive norms and hold for plaintiffs in discussions of research behaviors than in discussion of compositional behaviors.

D. *The Open Range of Judicial Discretion*

A fourth conclusion concerns the strategic usefulness of a habit of judicial permissiveness with respect to norms in one sort of case, and a habit of judicial restrictiveness with respect to norms in another sort of case. Courts can emphasize writing or editing, make or apply a permissive norm in a law-oriented discussion, and rule for the press.⁵⁸⁹ Or if the facts of the case permit, they can emphasize research, make or apply a restrictive norm, and rule for the plaintiff.⁵⁹⁰ Perhaps these options represent a balance struck by the tort system in the libel context since *Sullivan*: The courts have created frameworks of both permissiveness and restrictiveness, protection and control, liberty and duty.

589. See *supra* notes 503-15 and accompanying text (emphasis on writing), and notes 546-55 and accompanying text (emphasis on editing).

590. See *supra* notes 517-45 and accompanying text (emphasis on research).

IV. IMPLICATIONS FOR JOURNALISM AND LAW

A. *Implications for Journalism*

The study suggests several questions that journalists need to discuss candidly and comprehensively. These questions relate to the role of courts in defining standards, the role of lawyers in the news process, and fears about confronting change in the libel tort.

1. Is the Role of Courts Discussed in this Study Acceptable to the Journalism Profession?

Journalists need to reflect upon whether they are benefitting from the dynamic of libel litigation. In that dynamic, the parties dispute journalistic behavior in pleadings, discovery, at trial, and on appeal. Trial judges and appellate judges evaluate the behavior in published decisions. Lawyers then transmit the published decisions to newsrooms. Newsrooms in some cases adjust behavior. Professors gather the precedents in treatises. Subsequent courts cite the holdings and *dicta* in other cases. Slowly an understanding of what are considered good and bad practices crystallizes. To be sure, the majority of norms arising from these cases are permissive, but a number are not. Moreover, all of the norms, permissive or restrictive, come from courts that lack expertise in journalism. In addition, courts formulate these norms in discrete cases in which relevant considerations about particular norms may be missing. The question for journalists is whether the role of the courts as *ad hoc* formulators of standards should continue.

2. Is the Role of Counsel in the News Process Acceptable to the Journalism Profession?

The judicial role recounted here necessarily leads to a significant role for lawyers in the newsroom. Judicial opinions, as we have seen, can contain explicit or implicit norms, and can run the gamut of journalistic behaviors. Lawyers are needed to carefully translate these opinions to writers and editors, and to suggest steps—perhaps changes in the way stories are researched, written, and edited—by which the media organization can avoid liability. Lawyers are needed, too, for prepublication review of copy for statements that may run afoul of existing norms. They also are needed to represent the media client in libel litigation that often is drawn out, fact-intensive, and behavior-based. Journalists should question the “middle-man” role that libel law has created for lawyers and the intrusion of lawyers into the journalistic process. Does the behavior-based dynamic of libel litigation promote over-engagement by lawyers in the enterprise of their cli-

ents? Does the lawyer's role in translating judicial opinions and advising newsrooms on preventive measures amount to a quasi-editorial function? Would the lawyer's role be reduced if the fault element of libel and its behavioral framework were eliminated? Today's libel law is problematic not only because judges are creating standards, but also because lawyers are not protesting this phenomenon on behalf of their clients. Instead, lawyers are transmitting judge-made norms to newsrooms, are counseling reporters on compliance, and in effect are legitimating the entire process.

3. How Reasonable is the Profession's Fear of Changing the Status Quo?

Even after examining the present study, journalists may wish to preserve the status quo in libel law because they win most cases and may be uncomfortable with the unknown, i.e., whatever system would come next. The logic of this discomfort is straightforward: It is one thing to criticize the system that has derived from *Sullivan*, but it is another thing to support steps to change it. Might not a "new order," however balanced it appears on paper, leave the press ultimately in a worse position? Uncertainty about potential dangers of a new system may underlie the profession's opposition to recent libel reform efforts.⁵⁹¹

It is useful to juxtapose the journalism profession's discomfort with libel reform to the profession's discomfort with detailed universal codes of conduct written by journalists themselves. The profession historically has shunned such codes. The American Society of Newspaper Editors, for example, in its Statement of Principles, summons editors to "the highest . . . professional performance,"⁵⁹² but leaves the phrase largely undefined. The Statement of Principles, like the codes of ethics of other journalism groups, favors generalities. Proscriptions, even by peers, are seen by many in the profession as infringing on editorial independence. As one prominent editor put it,

591. For a discussion of several recent reform proposals, see *infra* notes 602-18 and accompanying text. See generally *REFORMING LIBEL LAW* (John Soloski & Randall P. Bezanson eds., 1992) (gathering significant recent proposals for statutory revision of libel law). See also David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991) (evaluating current state of libel law and reform efforts). Professor Anderson writes, "Media skepticism of reform proposals is understandable. They are being asked to trade risks that are generally known, sometimes controllable, and nearly always insurable, for changes whose effects are at least as unpredictable now as the effects of *Sullivan* and *Gertz* were when those cases were decided." *Id.* at 549.

592. American Society of Newspaper Editors, Statement of Principles, reprinted in JOHN L. HULTENG, *PLAYING IT STRAIGHT: A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS* 3 (1981).

I think that there is an obligation on the part of each editor, each reporter, each publisher, to decide upon her or his own ethical standard. . . . I do not believe in regulation of the newspaper business from the outside, and, philosophically, I have to be against regulation from the inside. I do not want to sit in judgment on other newspapers and I do not think it is a healthy thing to do.⁵⁹³

The paradox, then, is that while journalists oppose self regulation through detailed professional rules of behavior,⁵⁹⁴ they have been silent about regulation by the judiciary through libel decisions. Reporters and editors appear to tolerate the surrender to court control and the unpredictable regulations the courts produce. It may be that some journalists are simply unaware of the scope of the courts' activity in this area.

Journalists' discomfort with the unknown can be reduced by a clear understanding that courts are devising standards. Because courts are engaged in precisely the activity that journalists think should be avoided, the profession should at least undertake a more active part in addressing libel law and its future. Leaving such discussions to the media bar and others may be a luxury that the profession can no longer afford.

B. Implications for the Law

This study has demonstrated that the actual malice privilege works against the values that prompted its creation and is therefore fundamentally flawed. Our conclusion raises the question of how American libel law should respond. The fundamental concern of the *Sullivan* case remains compelling—that the possibility of debilitating jury verdicts in common-law libel actions against the press may cause journalists to “play it safe” by not publishing certain stories that are believed to be true but may pose problems of provable truth for the

593. *Remarks by A.M. Rosenthal*, ASNE 1987, Proceedings of the 1987 Convention of the American Society of Newspaper Editors, at 36, 45.

594. In a major departure, the Ethics Committee of the Associated Press Managing Editors Association presented a draft of a six-page ethics code at the annual meeting of the organization in September 1993. The proposal defined professional standards for journalism in much greater detail than the one-page Ethics Code adopted by the editors in 1975 and in considerably greater detail than any other journalism group has attempted. See Mark Fitzgerald, *A Debate About Ethics Code*, EDITOR & PUBLISHER, Oct. 9, 1993, at 9. However, criticism by journalists and media lawyers of the proposal's specificity caused the proposal to be modified drastically so that it more closely resembles the 1975 version. The revised draft was scheduled to be debated by the Associated Press editors at their annual meeting in October 1994. See Tony Case, *APME Retreats on Strict Ethics Code*, EDITOR & PUBLISHER, Aug. 13, 1994, at 18-19.

defense if suit should be filed.⁵⁹⁵ The question becomes how to address the "chilling effect" of the threat of strict liability in a way that avoids the pitfalls of the actual malice privilege. Several options deserve a fresh look.

1. Return to the Common-Law Tort, with a Twist (or Two)

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁵⁹⁶ Justice White's concurring opinion openly questioned the means chosen in *Sullivan* to address the perceived effect of the strict liability tort. Justice White declared that the actual malice privilege "countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed."⁵⁹⁷ In considering roads that might have been taken, Justice White articulated an approach based on restoration of the common-law tort, but with an important difference. Justice White observed: "[I]nstead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press."⁵⁹⁸ In addition, "[p]unitive damages might have been scrutinized . . . or perhaps even entirely forbidden" and "[p]resumed damages . . . might have been prohibited, or limited, as in *Gertz*."⁵⁹⁹ Thus, Justice White felt that whatever chilling effect was induced by common-law strict liability could be addressed sufficiently under the First Amendment by a cap on damages.

In the same paragraph, Justice White indicated, although not so explicitly, another change. He wrote: "Had . . . the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His

595. *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (criticizing large damage awards under common law libel for the resulting "pall of fear and timidity . . . upon those who would give voice to public criticism"). See generally Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the "Chilling Effect,"* 58 B.U. L. REV. 685, 689-94 (1978) (arguing that a chilling effect occurs when an individual seeking to engage in an activity protected by the First Amendment is deterred by a governmental regulation not specifically directed at that protected activity, causing some individuals to refrain from saying or publishing that which they actually could and should say or publish).

596. 472 U.S. 749 (1985).

597. *Id.* at 769 (White, J., concurring).

598. *Id.* at 771 (White, J., concurring).

599. *Id.* (White, J., concurring). In *Gertz*, the Court held that a private plaintiff could not recover presumed damages absent clear and convincing evidence of actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

reputation would then be vindicated. . . ."⁶⁰⁰ This statement implies that in a restored common-law action the plaintiff could be required to prove falsity, in contrast to the original tort in which falsity was presumed and the defendant could defend on the grounds of truth.⁶⁰¹

Justice White's interest in taking a second look at the common-law tort has scholarly support. Noting that the actual malice privilege seems to have failed to reduce public-plaintiff libel actions against the press, and attributing the last decade's wave of libel litigation to the availability of large jury verdicts even under *Sullivan*, Professor Epstein has proposed a return to the strict liability tort, again with a twist.⁶⁰² In Epstein's proposal, "some damage award [would] remain appropriate," but "it should be carefully circumscribed."⁶⁰³ Epstein takes seriously the chilling effect of the common-law tort, but thinks that *Sullivan*'s solution is inferior to a strict liability system with a cap on damages. Besides being fairer to plaintiffs by dispensing with the burden of proving actual malice,⁶⁰⁴ the latter system would benefit the press by diminishing the attractiveness and hence the frequency of filed suits.⁶⁰⁵ Litigation costs, he believes, also would drop.⁶⁰⁶ Abolishing the actual malice element would reduce damages in litigated cases since "juries and judges are far less likely to be inflamed if the only evidence they see relates to the statement made and its consequences for the plaintiff's welfare."⁶⁰⁷ Epstein also advises consideration of "a fixed [statutory] maximum on recovery in all libel cases," or a rule linking damages to defendants' revenues.⁶⁰⁸

If the flaws associated with the actual malice privilege are taken seriously, the common-law tort may serve, at the very least, as a

600. *Dun & Bradstreet, Inc.*, 472 U.S. at 771 (White, J., concurring).

601. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116, at 839 (5th ed. 1984) (discussing common-law rule of libel that "the defamatory statement is regarded as false unless the defendant proves truth").

602. See Richard A. Epstein, *Was New York Times Co. v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 814-17 (1986).

603. *Id.* at 815.

604. *Id.* at 801 (arguing that the *Sullivan* 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").

605. *Id.* at 806 (speculating that "in part the number of cases brought may well be a function of the types of damages that are demanded under the actual malice rule"); *id.* at 807 (theorizing that large awards of actual and punitive damages are a function of the actual malice test which highlights media "culpability").

606. *Id.* at 810 (noting "the relationship between litigation expenses and the shape of the substantive rule" and suggesting that the actual malice rule creates a "high uncertainty/high stakes game[]" that "generates high litigation expenses for plaintiffs and defendants alike").

607. *Id.* at 815.

608. *Id.*

framework for change, leading to modifications as a cap on damages and a shifted burden with respect to truth and falsity.

2. Press Immunity in Public-Plaintiff Damages Suits, and Provision for Declaratory Judgment

As Professor Epstein pointed out, the actual malice privilege amounts to a "compromise between the strict liability and no liability positions."⁶⁰⁹ If a shift to strict liability, however modified, seems inappropriate, a shift to the opposite end of the scale may be preferable.

In *Sullivan*, Justices Black, Douglas, and Goldberg were unimpressed with the Court's compromise.⁶¹⁰ As noted earlier, Justice Black forcefully pointed out in his concurrence that

"[m]alice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.⁶¹¹

The three Justices would have ruled that the *New York Times* and the other defendants in *Sullivan* enjoyed an absolute right to publish expression critical of official conduct.⁶¹²

Given the present study's evidence of how truly "evanescent" the actual malice privilege has turned out to be, and given uncertainty as to whether a modified strict-liability regime would meet concerns about the threat of lawsuits and consequent self-censorship, it may be that the better reform is to abolish entirely the public plaintiff's cause of action for damages. Clearly the compromise of *Sullivan* has not worked, and some may think that another compromise within the structure of the tort itself, along the lines that Justice White and Professor Epstein have contemplated,⁶¹³ will not appreciably solve the problem.

Of course, abolition of the public plaintiff's damages suit will leave those plaintiffs without a legal remedy. This raises questions of

609. *Id.* at 801 (arguing that the actual malice rule departs from the no-fault rule of the common-law cause of action and yet stops short of the rule of absolute immunity for the press advocated by Justices Black, Douglas, and Goldberg in *Sullivan*).

610. *New York Times Co. v. Sullivan*, 376 U.S. 254, 293-97 (1964) (Black, J., concurring); *id.* at 297-305 (Goldberg, J., concurring in the result). Justice Douglas joined in both Justice Black's and Justice Goldberg's opinions.

611. *Id.* at 293 (Black, J., concurring).

612. *Id.* at 296-97 (Black, J., concurring); *id.* at 304-05 (Goldberg, J., concurring in the result).

613. *See supra* notes 596-608 and accompanying text.

fairness. In addition, the public interest in at least approximating political truth may suffer if there is no forum for public persons to contest damaging statements made about them. Moreover, some argue that, without such a forum, worthy individuals will be deterred from pursuing public lives or careers.⁶¹⁴ Gauging the accuracy of that position, of course, is difficult. In any event, although abolition of the cause of action by definition eradicates the problem of self-censorship, it may also leave plaintiffs without protection and the public without a built-in apparatus for receiving competing information about public matters.

Therefore, it may be appropriate to take another look at proposals advocating the creation of an action for declaratory judgment for public plaintiffs, in which plaintiffs would seek not money damages but a judicial finding that the challenged publication was false. Practically speaking, this was the design of the 1985 proposal by Congressman Charles Schumer.⁶¹⁵ A recent variation would require a losing defendant in an action for declaratory judgment to publish or cause to be published either a correction satisfactory to the plaintiff or the contents of the court's finding on falsity.⁶¹⁶ Whether mandatory publication of this kind can survive First Amendment scrutiny depends in part on the applicability of *Miami Herald Publishing Co. v. Tornillo*.⁶¹⁷ Even if a scheme involving both declaratory judgment and mandatory

614. See Anderson, *supra* note 591, at 531-33; Epstein, *supra* note 602, at 799.

615. H.R. 2846, 99th Cong., 1st Sess. (1985), reprinted in MARC A. FRANKLIN & DAVID A. ANDERSON, *MASS MEDIA LAW CASES AND MATERIALS* 409-10 (1990).

616. MODEL COMMUNICATIVE TORTS ACT § 9-107, 47 WASH. & LEE L. REV. 1, 64 (1990). A similar provision, known as "the vindication remedy," appeared in Section 7 of the proposed Uniform Defamation Act (Committee Draft 1991), reprinted in REFORMING LIBEL LAW, *supra* note 591, at 323-51. The proposed Act was the work of a Drafting Committee of the National Conference of Commissioners on Uniform State Laws. After a number of drafts and considerable controversy over the vindication remedy, the proposed Act was withdrawn in 1993. See generally Robert M. Ackerman, *Bringing Coherence to Defamation Law through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 302-11 (1994) (recounting streamlining elements of the proposed act and analyzing the vindication remedy).

617. 418 U.S. 241 (1974). In *Tornillo*, the United States Supreme Court reviewed Florida's "right of reply" statute which required that a newspaper publish, at its own expense, a political candidate's reply to any statement made by the newspaper assailing the candidate's personal character or charging the candidate with malfeasance or misfeasance in office. *Id.* at 244-45 n.2. The court invalidated the statute, declaring that it "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258. In his analysis of the vindication remedy of the proposed Uniform Defamation Act, Professor Ackerman suggests that its rule of mandatory publication could "run afoul of the First Amendment" under *Tornillo*. Ackerman, *supra* note 616, at 309. In addition, although the proposed Act would allow a media defendant to avoid publishing the vindication itself by paying to secure its publication elsewhere, "such payment might [be] considered damages in violation of the fault requirements of *Sullivan* and *Gertz*." *Id.* at 309 n.95.

publication survives review, practical dilemmas may make it unworkable, such as the problem of providing attorneys an incentive to represent plaintiffs in a non-damages action of this kind.⁶¹⁸

3. Comprehensive Statutory Reconfiguration of the Libel Tort

A third option is to reconfigure the cause of action in a way that, while not eliminating the actual malice privilege, is likely to reduce significantly the role of actual malice in libel litigation. This approach would limit the output of judicial decisions addressing fault and, by extension, journalistic behavior. An example is the Annenberg Libel Reform Proposal of 1988.⁶¹⁹ This proposal creates a set of priorities and incentives to steer the parties away from the conventional action for damages. It addresses a range of other matters as well, such as the fact/opinion distinction, the burden of proving falsity, and common-law privileges.⁶²⁰ At the heart of the proposal are "forceful retraction and reply mechanisms, requiring every potential plaintiff to seek from the defendant either a retraction or an opportunity to reply before filing suit."⁶²¹ If the defendant acquiesces in the request, the suit must end.⁶²² If the parties are deadlocked at this stage, either party may designate the suit as an action for declaratory judgment.⁶²³ Choosing this option ends the plaintiff's right to seek damages.⁶²⁴ An action for damages thus is possible only when the preliminary options have not been exercised. For our purposes, the significance of the Annenberg Proposal is that the retraction/reply and declaratory judgment provisions are calculated to shrink dramatically the importance of actual malice in resolving libel disputes.

It may be that "compulsory access to privately owned print media is an idea whose time has come and gone." SACK & BARON, *supra* note 78, § 8.6.2, at 530.

618. See SACK & BARON, *supra* note 78, § 8.6.3, at 533 (speculating on the role of the attorney's financial incentive in declaratory judgment litigation). The proposed Uniform Act included a provision awarding attorney's fees to the prevailing plaintiff in a vindication action under specified circumstances. See UNIFORM DEFAMATION ACT § 8 (Committee Draft 1991), reprinted in REFORMING LIBEL LAW, *supra* note 591, at 332. Professor Ackerman raises constitutional and policy questions about this fee-shifting provision. See Ackerman, *supra* note 616, at 309-10. Fee shifting has been a prominent feature of other libel reform proposals. See Franklin, *Declaratory Judgment Alternative*, *supra* note 81, at 842-44.

619. ANNENBERG PROPOSAL, *supra* note 81.

620. *Id.* at §§ 2, 6, 8.

621. Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 32 (1989).

622. ANNENBERG PROPOSAL, *supra* note 81, § 3(a)(3).

623. *Id.* § 4(a), (e).

624. *Id.* § 4(b).

A proposal more limited in scope is the recent Uniform Correction or Clarification of Defamation Act.⁶²⁵ The Uniform Act, a vestige of the withdrawn Uniform Defamation Act,⁶²⁶ deals exclusively with the pre-filing stage of a libel dispute. As a prerequisite to seeking damages, a would-be plaintiff must make a "timely and adequate request for correction or clarification."⁶²⁷ If the correction or clarification is made, the plaintiff can recover only "provable economic loss," defined as "special, pecuniary loss caused by a false and defamatory publication."⁶²⁸ Again, the objective is to obviate the need for a damage suit. With fewer suits, judges would have fewer occasions to address actual malice and fewer decisions would relate to press conduct. The problem raised by the present study would not go away, to be sure. But as opportunities for judicial creation of journalistic standards diminish, courts may become more self-conscious about what they are doing and less willing to do it.

4. Bar Against Plaintiff's Use of "Compositional Behaviors" as Evidence of Actual Malice

If the actual malice requirement is a problem because it invites judicial creation of professional standards and hence seriously intrudes into the practice of journalism, a way to address the problem short of dropping the fault requirement altogether might be to limit the types of behavioral evidence that plaintiffs can introduce on the malice issue. As noted above,⁶²⁹ cases examined in the present study suggested that courts are more restrictive in setting standards for research-oriented behaviors than they are for the creative, compositional behaviors associated with writing and editing. Perhaps libel doctrine formally should provide for what some courts instinctively seem to know: that the processes of writing and editing are at the heart of the intellectual project of journalism, and that these processes must be free from scrutiny or second-guessing by judges or juries.

This conclusion would appear to fly in the face of *Herbert v. Lando*,⁶³⁰ in which the Supreme Court declined to recognize a First

625. UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT (Unofficial Final Draft Oct. 13, 1993).

626. For a discussion of the relationship between the Uniform Defamation Act and the Uniform Correction or Clarification of Defamation Act, see Ackerman, *supra* note 616, at 314.

627. UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT § 3 (Unofficial Final Draft Oct. 13, 1993).

628. *Id.* §§ 1(2), 5.

629. See *supra* notes 432-33 and accompanying text.

630. 441 U.S. 153 (1979).

Amendment-based privilege against responding to plaintiff's inquiries about all relevant aspects of the editorial process in an actual malice case.⁶³¹ However, the *Herbert* decision was premised on the viability of *Sullivan*, particularly on the balance struck by that case in creating the actual malice test.⁶³² The present study questions that test in a fundamental way and therefore questions the cases that build on *Sullivan* as well. Moreover, none of the arguments considered and rejected by the Court in *Herbert* is equivalent to the critique of the present study, that is, that judicial discussions of behaviors in the journalistic process lead to explicit and implicit professional standards, and thus intrude expansively into the free speech of publishers. Finally, the *Herbert* case is confined to First Amendment analysis and does not preclude statutory and other legal avenues of recognizing a bar against evidence relating to the editorial process in libel cases.⁶³³

A fourth conclusion, then, derives directly from the present study. Courts should not consider writing and editing behaviors as circumstantial evidence of actual malice. These behaviors should remain protected from scrutiny because they are central to the intellectual process of expression which must be unregulated in order to thrive. Many courts today do seem to be deferential in these areas, undoubtedly sensing the inappropriateness and incompetence of judicial involvement. However, not all courts are deferential. It is worth considering a rule that such evidence should be barred. Evidence of research—including, among other things, the reliability of sources and source material—would remain permissible.

V. CONCLUDING THOUGHTS: THE *SULLIVAN* PARADOX

This has been a study of the workings over time of one of modern American law's most dramatic doctrinal developments: the actual malice requirement of *New York Times Co. v. Sullivan*. Once an occasion for "dancing in the streets,"⁶³⁴ that requirement now has permeated thirty years of litigation. It has also been the subject of fertile scholarly discussion, particularly in the last decade when the rule

631. *Id.* at 169-75.

632. *Id.* at 169 (reaffirming "the balance struck in *New York Times*").

633. *See* Maressa v. New Jersey Monthly 445 A.2d 376, 383 (N.J. 1982) (noting that *Herbert v. Lando* "simply held that the First Amendment does not grant a privilege to withhold editorial processes," and holding that "the New Jersey Shield Law affords newspersons an absolute privilege not to disclose confidential sources and editorial processes, absent any conflicting constitutional right").

634. *See supra* note 6.

seemed powerless to deter a siege of high-profile lawsuits.⁶³⁵ Calls for reform have centered on reducing the likelihood of litigation through adoption of various steps and procedures to promote the early correction of error.⁶³⁶ However, despite the high quality of the continuing debate, the status quo remains unshakable. Perhaps this is because the participants have overlooked what may be the most basic problem with the *Sullivan* requirement: its propensity to place judges in the role of shapers of journalistic standards.

Our study demonstrates that courts have become entangled in evaluations of virtually every aspect of the news process, from the first steps in researching a story, through the complex business of writing and editing the final product. Lip service is paid to "accepted journalistic practice" and expert witnesses opine on the witness stand about what that phrase means in a given context, but the courts reserve to themselves the final word on acceptable press behavior. In applying the actual malice requirement, courts sift through evidence of press conduct and invariably—and inevitably—characterize it. Opinions are then written that state or strongly suggest the sorts of conduct that will "count" in judicial analyses of fault. As media institutions and their lawyers track such decisions, they come to appreciate both the specificity of the decisions and the costs of not paying attention. At the same time, they may suffer confusion at the courts' reserved discretion to deploy various modes of analysis, as well as their selectivity in fashioning restrictive norms in some cases and permissive norms in others.

The future of the judicial role in libel cases is the ultimate question posed by the study. Is the current role appropriate? Can the journalism profession continue to countenance the judicial shaping of standards without qualm or objection? This year's thirtieth anniversary of the Supreme Court's landmark ruling may be precisely the moment for the press—the regulated party in the libel system—to come to grips with the price and the paradox of *Sullivan*.

635. See SMOLLA, *SUING THE PRESS*, *supra* note 385, at 3-6 (describing "explosion of litigation" in the late 1970s and the first half of the 1980s).

636. See *supra* notes 602-18 and accompanying text.

APPENDIX

TABLE 1

Journalistic Behaviors At Issue in Actual Malice Cases

	<u>Journalistic Behavior</u>	<u>Percentage of Cases</u>	<u>Number of Cases</u>
1.	Failure to verify information provided by a source.	29.0%	122
2.	Story written in an unclear way that could cause readers to misconstrue its meaning.	28.0%	118
3.	Failure to provide an accurate summary of information.	26.6%	112
4.	Failure to investigate adequately the information in the story.	23.3%	98
5.	Failure to verify unreliable information.	17.6%	74
6.	Animosity toward plaintiff.	11.9%	50
7.	Use of an unreliable source.	11.4%	48
8.	Story exaggerated charges against the plaintiff.	8.8%	37
9.	Lack of due care in reporting story.	8.6%	36
10.	Story not evenly balanced.	8.6%	36
11.	Failure of a reporter or editor to act on information that the story contained false information prior to publication.	7.4%	31
12.	Story repeated false information about plaintiff.	6.9%	29
13.	Story omitted pertinent information.	5.9%	25
14.	Use of a source hostile to the plaintiff.	5.9%	25
15.	Failure to provide plaintiff with an opportunity to respond to allegations.	5.7%	24
16.	Failure to correct information in story after being informed that it was false.	5.5%	23
17.	Insufficient correction or apology.	5.2%	21
18.	Failure to follow accepted journalistic practices.	5.0%	20
19.	Story edited in a way that defamed the plaintiff.	4.8%	17
20.	Use of a confidential source.	4.0%	17
21.	Use of an inaccurate quotation.	4.0%	17
22.	Headline was inaccurate or misleading.	4.0%	14
23.	Failure to contact an obvious source.	3.3%	13

24.	Failure to check identification of plaintiff.	3.1%	9
25.	Misleading use of photograph.	2.1%	9
26.	Lack of formal procedures for verifying the story information.	2.1%	9
27.	Technical error caused plaintiff to be harmed.	1.4%	6
28.	Failure to find additional sources who would contradict information provided by other sources.	1.0%	4
29.	Reporter coached sources.	.5%	2
30.	Media had destroyed information pertinent to the story and the libel suit.	.2%	1
	Total	251.8%*	1060

* The percentage exceeds 100% because more than one behavior was cited in most cases.

TABLE 2

*Journalistic Behaviors At Issue in Actual Malice Cases
Compared with Case Outcome*

Journalistic Behavior	Percentage of Cases Won by Plaintiffs	Number of Cases
1. Media destroyed information pertinent for the story and libel suit.	100%	1
2. Failure to verify unreliable information.	67.6%	74
3. Failure to contact an obvious source.	57.1%	14
4. Lack of formal procedures for verifying story information.	55.6%	9
5. Failure to correct information in story after being informed it was false.	52.2%	23
6. Failure to follow accepted journalistic practices.	47.6%	21
7. Story repeated false information about the plaintiff.	41.4%	29
8. Story omitted pertinent information.	40.0%	25
9. Story edited in a way that defamed the plaintiff.	40.0%	20
10. Failure of a reporter or editor to act on information that the story contained false information prior to publication.	38.7%	31
11. Failure to provide plaintiff with an opportunity to respond to allegations.	37.5%	24
12. Use of an unreliable source.	35.4%	48
13. Use of a confidential source.	35.3%	17
14. Technical error caused the plaintiff to be harmed.	33.3%	6
15. Insufficient correction or apology.	31.8%	22
16. Headline inaccurate or misleading.	29.4%	17
17. Use of a source hostile to the plaintiff.	28.0%	25
18. Lack of due care in reporting story.	27.8%	36
19. Failure to verify information provided by source.	27.0%	122
20. Failure to find additional sources who would contradict information provided by other sources.	25.0%	4
21. Failure to provide an accurate summary of information.	24.1%	112
22. Animosity toward the plaintiff.	24.0%	50

23.	Failure to investigate adequately the information in the story.	22.4%	98
24.	Story written in unclear way that could cause readers to misconstrue its meaning.	18.6%	118
25.	The story was not evenly balanced.	16.7%	36
26.	The story exaggerated charges against the plaintiff.	16.2%	37
27.	Use of an inaccurate quotation.	11.8%	17
28.	Misleading use of photograph.	11.1%	9
29.	Failure to check identification of plaintiff.	7.7%	13
30.	Reporter coached sources.	0.0%	2

