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EXPENSIVE SPEECH


REVIEWED BY NEIL SKENE*

Tom Wicker dates modern press-bashing from the night of July 14, 1964, when Dwight D. Eisenhower told delegates to the Republican National Convention not to let themselves be divided by "those outside our family, including sensation-seeking columnists and commentators." Mr. Wicker recalls his astonishment at the "shouting, livid delegates, rising almost as one man, pointing, cursing, in some cases shaking their fists, not just at the men in the glass booths but at me." He feared that some delegates might leap over the railing and attack the reporters, who were "gazing in astonishment at this sudden surge of hatred."

Of course, even the ancient Greeks punished the messenger for the message. Given the number and proximity of the aroused Republicans or the fatal nature of the Greek retribution, journalists might appreciate the relative civility of a libel suit. If it were not already obvious that lawsuits against the press have become legal monstrosities, Professor Ronald A. Smolla makes it obvious with his new study of some of the most publicized libel cases of the 1980's. *Suing the Press* is distinguished by its balance. It neglects neither the importance of free speech nor the value of individual reputation. Professor Smolla discusses cases, such as *New York Times Co. v. Sullivan,* that were abominable abuses of the libel claim. He also describes cases, such as Carol Burnett's suit against the *National Enquirer,* that arose from abominable conduct by


1. T. WICKER, ON PRESS 1 (1975).
2. Id. (emphasis in original).
3. Id.
the press. Between these extremes are a host of other disputes for which libel law as it is now constituted is poorly suited.

A passage from Professor Smolla’s opening pages is worth quoting at some length because it demonstrates his effort to view these noted libel cases, and the law of libel generally, from different perspectives:

The current explosion of litigation against the media poses a long list of intriguing questions. Why do plaintiffs sue the press? Is it money they seek? Vengeance? Restoration of honor? How important is the protection of reputation in our society, and how important should it be? Are libel suits a manifestation of a growing recognition of a new form of “civil right,” a manifestation of concern for human dignity that is primarily directed at protecting emotional and mental tranquility? Or are libel suits a sign of a new national narcissism, a narcissism that provokes violent responses to excessive media criticism of individuals and national institutions? . . . Has the press grown too powerful, too arrogant, too oracular in tone? When the press makes errors that injure reputations, are the errors usually innocent, or are they often the result of careless or even reckless work? . . . How often is what purports to be a battle over “truth” really a battle of competing ideologies? . . . What sorts of emerging cultural attitudes, biases, and perceptions are shaping jury verdicts? What is the social cost, in terms of court time, legal fees, and other “societal overhead” of libel litigation? . . . What is the toll that anti-media litigation takes on First Amendment values? . . . What alternatives, if any, exist to the present legal process for arbitrating conflicts between individual privacy and free expression?*

The answers to all of these questions are in the eye of the beholder, for Professor Smolla offers few answers of his own. One could easily conclude from his book that the litigants all deserve each other. It is difficult to muster much constitutional sympathy for the National Enquirer, whose reporter simply made up the story that Carol Burnett was boisterous in a Washington restaurant, but it is also hard to imagine that Carol Burnett, who has grown rich and famous from publicity of all types, suffered multimillion-dollar damages from a few lines in a grocery-store tabloid. It is clear that CBS News abandoned ethics and objectivity in putting together its documentary on General William Westmoreland, “The Uncounted Enemy: A Vietnam Deception,” but it is also

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clear that some intelligent people strongly believed that Westmoreland had massaged the estimates of enemy troop strength. The Washington Post, in reporting that Mobil Oil President William Tavoulareas “set up” his son Peter in a lucrative shipping business, simply drew conclusions from selected facts and omitted some facts exculpatory to Mr. Tavoulareas. As Professor Smolla puts it:

Does anyone in their heart of hearts really believe that a twenty-four year old named ‘Peter Sixpack’ making $16,500 a year would have been brought in as an equity partner in a lucrative million dollar shipping deal without putting up any front money? Of course it made a difference that Peter’s last name was Tavoulareas.7

Suing the Press benefits from this kind of refreshingly direct analysis, which contrasts with the stodgy language of most legal scholarship. Both the connoisseur and the novice in the field of libel will find the book readable and enlightening. It often has a journalistic quality, producing realism and understanding that reaches beyond the casebooks. The journalistic prose, however, occasionally sounds a bit like Geraldo Rivera; for example, a passage from the Westmoreland chapter regarding the battle of Khesahn reads: “And in the end, like the lawsuit Westmoreland v. CBS, the battle just stopped, as arbitrarily as it had begun, when, after General William Westmoreland ended his tour of Vietnam duty, the United States forces simply packed up and left. They’re still there, and we’re all gone.”8

I. FROM Sullivan TO Hellman

“If you can’t call Lillian Hellman a liar on national TV,” a writer in Harper’s once wondered, “what’s the First Amendment all about?”9 Lillian Hellman made a career of controversy and nasty remarks. She made speeches supporting the Spanish Loyalists. She wrote bitterly about the darker side of children in her 1934 play, The Children’s Hour. She was doctrinaire in attacking evil as she saw it and dramatically defied the House Un-American Activities Committee. She carried on running feuds with novelist Mary McCarthy and others. When writer Diana Trilling was quoted as say-

7. Id. at 191 (emphasis in original).
8. Id. at 237.
ing that "anyone who entertains me is never again invited to Lil-
lian Hellman's house," Miss Hellman was quoted as responding: "I
have no idea who invites Mrs. Trilling to dinner. I do not live my
life in quite so high fashion, but then I also do not stand in front of
a mirror all day."10

Miss McCarthy likewise made a career of sharp remarks about
literary figures. She had been criticizing Miss Hellman's work for
more than thirty years before she appeared on the Dick Cavett tele-
vision show early in 1980. The talk on the show turned to over-
rated authors.

Mary McCarthy: The only one I can think of is a holdover like
Lillian Hellman, who I think is tremendously overrated, a bad
writer, and dishonest writer, but she really belongs to the past, to
the Steinbeck past, not that she is a writer like Steinbeck.
Dick Cavett: What is dishonest about her?
Mary McCarthy: Everything. But I said once in some interview
that every word she writes is a lie, including "and" and "the."11

The audience laughed, but obviously not Lillian Hellman. Miss
Hellman sued Mary McCarthy for $2.25 million. Miss Hellman
died, however, before the case could go to trial. As Professor
Smolla says, it was a case between "two brilliant American writers
and visible cultural figures," and the "only sure consequence
[would have been] less freedom and literary honesty for all
writers."12

Courtrooms are hardly the place for a determination of whether
Lillian Hellman is a "dishonest" writer. In a work of fiction, of
course, every word is indeed a lie, though it is often argued that
fiction can reveal a larger truth. It is likewise true that facts can
"lie," or lead to erroneous conclusions. Those ethereal matters
aside, Miss McCarthy was clearly stating a literary opinion—a
harsh and exaggerated opinion, but a literary opinion nonetheless.
Even though Miss Hellman's lawsuit withstood a motion to dis-
miss,13 it is surely not the sort of dispute that is suitable for resolu-
tion in court.

Yet it is the sort of dispute that is showing up more in libel litig-
ation. The libel suit has become the forum for debating a variety

10. Id. at 15.
11. R. Smolla, supra note 6, at 63 (quoting transcript).
12. Id. at 65.
of public issues. The plaintiffs are often merely symbols of larger controversies; General Westmoreland, for example, symbolized the United States' conduct of the Vietnam war. Sharp, exaggerated criticism of famous people is an American tradition dating back to John Peter Zenger's published comments on the corruption and oppression of the royal governor in colonial New York. Thomas Jefferson was called a libertine, an atheist, and a spendthrift.  

The United States Supreme Court injected this tradition into the law of libel when it decided New York Times Co. v. Sullivan.  

Erroneous statements are "inevitable in free debate" and, in the context of libel suits, should be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The Court even quoted John Stuart Mill's famous view that false statements can themselves contribute to public debate by bringing about "the clearer perception and livelier impression of truth, produced by its collision with error." To protect free debate about public officials, the court declared that public officials could not win libel suits unless they proved that the defendant acted with what the court misleadingly called "actual malice"—with knowledge that a statement was false or with "reckless disregard" for whether it was true.

The facts of the Sullivan case made it painfully obvious to the Supreme Court that libel law could be used to harass those who published unpopular ideas. The Times representatives in the Alabama courtroom in 1960 must have felt as Tom Wicker felt the night of President Eisenhower's speech to the Republican convention. The plaintiff was the city police commissioner, L.B. Sullivan, and the claim was that an advertisement in the Times, entitled Heed Their Rising Voices, had libeled him with its passionate calls for justice for Martin Luther King, Jr. Only 394 of the 650,000 copies of the Times circulated in Alabama, but that had been enough to give the Alabama courts jurisdiction over the newspaper. The advertisement had several errors. A song sung by black students during a demonstration was not "My Country, Tis of Thee" but

14. R. SMOLLA, supra note 6, at 16.
16. Id. at 270.
17. Id. at 279 n.19 (quoting J. MILL, ON LIBERTY (1947)).
18. Id. at 279-80.
the national anthem. Nine students had been expelled from college, not for leading the demonstration as the advertisement said, but for demanding service at a segregated lunch counter. Police never "ringed" the campus, although they were there in large numbers. Dr. King had been arrested not seven times but four (which, ironically, probably could have been construed as defamation of Dr. King). There were other such errors. Nowhere, however, was L.B. Sullivan mentioned.

Dislike for the *Times* was so great that the newspaper had trouble finding an Alabama lawyer to represent it. The trial judge, who had earlier published a document called *The Confederate Creed*, declared during the case that the fourteenth amendment "has no standing whatever in this Court."20 Commissioner Sullivan's lawyers repeatedly used the term "nigger."21 The lawyers also concocted an amazing argument: They said the advertisement, though not naming Commissioner Sullivan, imputed bad conduct to him because of his supervisory role over the police, yet they used the fact that many of the incidents described had nothing to do with Sullivan to prove that the statements imputing improper conduct to him were false. The Alabama jury bought the argument and returned a verdict for $500,000 against the *Times*. More libel suits from Alabama officials were pending.

The Supreme Court's reversal of the verdict and its incorporation of first amendment principles into the law of libel were viewed as the beginning of the end of libel suits by public officials. The optimism of the press was enhanced later by the extension of the *New York Times* principles to "public figures," such as a university football coach22 and a retired army general,23 and to private persons involved in matters of public interest.24

So how does it happen that, two decades later, Lillian Hellman, William Westmoreland, Carol Burnett, and a host of others are filing libel suits? It certainly reflects more than narcissism; even the thinnest-skinned soul would not rationally undertake litigation that is doomed to fail. The broad answer is that the expansion of free speech protection in libel cases was curtailed after 1971, when

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20. R. Smolla, *supra* note 6, at 33.
21. *Id.*

Palm Beach socialite Mary Alice Firestone, whose divorce case was as filled with sexual adventure as the Pulitzer divorce trial a decade later, was held to be a "private figure." The Supreme Court took back its suggestion that private individuals involved in matters of public interest would be treated as public figures. One judge noted the baffling array of "public figure" decisions and declared, "Defining public figures is much like trying to nail a jellyfish to the wall." The Court also subjected newsroom procedures to the discovery process, which gave plaintiffs the chance to argue "reckless disregard for the truth" on the basis of editing changes, flaws in a reporter's notes, or curtailment of an investigation. This in turn helped plaintiffs survive motions for summary judgment and get their claims to juries, which seemed to show growing antagonism toward an institution so powerful that it could instigate the downfall of a President. The "damages" at issue in a libel case are rarely economic, because the focus is on damage to reputation rather than lost earnings or medical bills. Thus, juries have greater flexibility to return large verdicts, perhaps engaging in their own form of press-bashing.

Something else has been going on with no explicit discussion in the cases. In developing a standard of care in libel cases, courts sometimes have imposed their own romantic notions about journalistic practices or unskeptically applied the perceived standards of traditional mainstream newspapers. Plaintiffs have discovered newspaper codes of ethics, which are every bit as aspirational as the ethical considerations in the lawyers' Code of Professional Responsibility, and have used those codes to cross-examine reporters and editors on what standards they failed to meet. Worst of all, some courts have imposed extraordinary standards that bear no relation to practices in even the most fastidious newsrooms.

29. Professor Smolla says plaintiffs recover in one-third to one-half of all tort trials but in 55% to 85% of all libel trials. R. SMOLLA, supra note 6, at 73.
Perhaps the best example is the decision by a three-judge panel of the District of Columbia Circuit in *Tavoulareas v. Washington Post Co.* Judge George MacKinnon, joined by Judge Antonin Scalia, referred to testimony that Bob Woodward, who went from Watergate reporter to a senior editor at the *Post*, sought "holy shit stories" from his investigative reporters. Judge MacKinnon said a "reasonable inference" from the statement "is that Woodward, as editor, wanted from his reporters the same kind of stories on which he built his own reputation: high-impact investigative stories of wrongdoing." Whether this is called "hardhitting investigative journalism" or "sophisticated muckraking," the judge added, the evidence is relevant in determining reckless disregard for the truth. The judge's reasoning flatly contradicts the tradition of robust criticism that dates back to colonial times and was reaffirmed in *Sullivan*. It implies that newspapers should be satisfied with reporting what is given to them, not taking it upon themselves to ferret out skeletons in people's closets. It is nothing more than a nostalgic preference for the unskeptical journalism of another era.

Judge Scalia also imposed his own peculiar standard of courtly journalism in *Liberty Lobby, Inc. v. Anderson,* in which oldtime muckraking columnist Jack Anderson was the defendant. The judge wrote that a jury could have found malice in Mr. Anderson's failure to look his source in the eye rather than simply interviewing him over the telephone. A similar standard was applied by the South Carolina Supreme Court when it held a reporter negligent for checking the plaintiff's criminal record through a telephone call to the prosecutor rather than viewing the public record himself or contacting the plaintiff, with whom he was acquainted. Another court deemed it negligent for a reporter to rely on a police information service rather than the actual police record. All three cases reflect ignorance about normal newsroom practice.

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31. *Id.* at 121.

32. *Id.*

33. *Id.*


35. *Id.* at 1579.


mous amount of reporting, including "investigative" reporting, is done by telephone. A requirement of personal visits for every significant interview would not only bog down every story (which perhaps is the intent of Judge Scalia, who has never voted in favor of the press in a libel case on appeal\textsuperscript{38}), it would render more difficult the very fact-checking process that the courts increasingly demand.

None of this begins to take into account the problem of the private defendant, the ordinary citizen who is unversed in the complexities of libel law and who is accustomed to speaking his mind without benefit of counsel. The popular perception of libel law (a perception unintentionally encouraged by Professor Smolla's focus on celebrated cases) is that libel is a battle of titans—William Westmoreland and Mike Wallace; the president of Mobil Oil and the Washington Post; Jerry Falwell and Bob Guccione; Wayne Newton and NBC. Yet the intricate legalisms of free speech are inflicted on the obscure as well as the famous.

A fine example is \textit{Nodar v. Galbreath},\textsuperscript{39} a libel case brought by a schoolteacher who said she was defamed by a student's father. Dissatisfied with the teacher's performance, the father complained first to the teacher and various school officials. Getting no response, he then took his complaints regarding the curriculum, the teacher's grading, and her alleged verbal abuse of his son to a meeting of the school board where he made the alleged defamatory remarks. A jury awarded the teacher $5,000 in compensatory damages and $5,000 in punitive damages. An intermediate appellate court affirmed,\textsuperscript{40} but the Florida Supreme Court reversed and declared the communication privileged.\textsuperscript{41}

\section*{II. A Matter of Journalistic Form}

As Professor Smolla suggests, to some extent press defendants are hoist on their own petard. Journalism is no longer the rough-and-tumble occupation of sensation-seeking rummies whose ac-

\textsuperscript{38} Schmidt, \textit{Rehnquist and Scalia: 'Libel defendants cannot anticipate sympathetic treatment from the nominees,' AM. SOC'Y OF NEWSPAPER EDITORS BULL., July/Aug. 1986, at 22.

\textsuperscript{39} 462 So. 2d 803 (Fla. 1984).

\textsuperscript{40} Nodar v. Galbreath, 429 So. 2d 715 (Fla. 4th DCA 1983).

\textsuperscript{41} Nodar, 462 So. 2d at 803. The Florida Supreme Court held that public school teachers are not public officials, \textit{id.} at 808, and discussed express malice, which is different from actual malice and necessary for a plaintiff to prove in order to defeat a defendant's privilege to publish a defamatory statement. \textit{id.} at 811.

counts of the same event vary from competitor to competitor, as depicted in *The Front Page*. The tone is more oracular now. Walter Cronkite declared, “That’s the way it is.” Editors write columns about their fairness and fact-checking. Watergate was in some respects a battle of credibility between a newspaper and a president, and the newspaper won.

Yet the reach of the press often exceeds its grasp. Newspapers, at best, report only the best obtainable version of the truth. A more honest appraisal is that newspapers report a large number of facts, assertions, and ideas and sometimes draw their own conclusions from them. Reporters may be taken in by sources, or may feel forced by newspaper convention to report statements known to be misleading or untrue. When President Eisenhower had a heart attack, reporters—and, through them, the world—were told by an official spokesman that he had a “chill.” President Reagan said on national television that more people were receiving food stamps than ever before, when the number actually had dropped by 400,000. These statements, although false, appeared in newspapers; it was enough that someone important had said them. Particularly with respect to news events in the making, facts are often difficult to determine on deadline. Sometimes truth is simply unknowable, and newspapers, like people in everyday life, must make do with judgments based on available facts which are not always consistent. In part because of newspapers’ own self-promotion, however, people put heavy demands on journalism. “Not only do they expect it to be entertaining, they expect it to be true,” wrote Lewis Lapham of *Harper’s* in an article on jury verdicts in libel cases.¹⁴

If newspapers could more clearly communicate the restrictions under which articles were written—and perhaps offer the explanations, often quite good, for publishing them despite their incompleteness—readers might better understand and tolerate error. Yet the concept of the “objective” story, divorced from opinion

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43. *Id. at 30.*


45. An excellent example of this acknowledgment that real truth is unknowable, at least for now, is a new book about the destruction of Korean Air Lines Flight 007 by a Soviet fighter on September 1, 1983. “I spent the next two years investigating . . . and found that Flight 007 was not on an intelligence-gathering mission for the CIA or any other agency of the United States or South Korea. But just why the plane ended up hundreds of miles off course may never be fully understood.” *S. Hersh, The Target Is Destroyed* (1986)
and free from any personal intrusion by the writer, dominates journalism. The use of this form by the Washington Post in its articles on William Tavoulareas conveyed to readers (and jurors) that the newspaper was representing its statements as "facts" instead of just one conclusion that could be drawn from the facts.

The lead paragraph in reporter Patrick Tyler's story said Mr. Tavoulareas "set up his son five years ago as a partner in a London based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no bid contracts." The son, Peter, was only twenty-four years old when the shipping firm, Atlas Maritime Corp., was started. He had recently graduated from Columbia business school and was making $16,500 a year as a trainee-executive for a Greek shipping company run by George Commas, who became an important source for the Post story. It seems that Mobil in 1974 was concerned that Saudi Arabia would require oil companies that bought Saudi crude to use Saudi ships, so Mobil went into a joint venture with prominent Saudis: Mobil's ships would be chartered, empty and unstaffed, to the joint venture, then chartered back with crews and provisions. The vessels would be managed by yet another company, Atlas, which was a partnership between Mr. Commas and Peter Tavoulareas. Mr. Commas told the Post that the elder Tavoulareas orchestrated the Atlas venture by asking Mr. Commas to take Peter in as a partner, later used Mobil funds to buy out Mr. Commas, then sent a Mobil executive to London to help Peter run the company. Mr. Tavoulareas, however, said it was Mr. Commas who wanted Peter to join Atlas. He also said the Saudi joint venture and Atlas were created not to help Peter but to protect Mobil from a Saudi shipping preference. When Peter joined Atlas, Mr. Tavoulareas told Mobil's Conflict-of-Interest Committee and recused himself from all final decisions on the whole arrangement. Mobil claimed that Mr. Tavoulareas had nothing to do with the dismissal of Mr. Commas and that the Mobil executive sent to London was paid by Atlas, not Mobil.

The Post reported both sides, but the tone of the article—indeed, its very publication—suggested that the Commas version of the story was correct. A good deal of material favorable to Mr. Tavoulareas was cut during the editing process. A Post copy

(adapted in THE ATLANTIC, Sept. 1986, at 47). Hersh describes the various theories and suggests which is most probably true.

46. R. SMOLLA, supra note 6, at 182-83. The facts of the case are recited by Professor Smolla.
editor even wrote an internal memo suggesting that part of Tyler's case against Tavoulareas appeared tenuous. Mr. Tavoulareas sought a retraction. The Post refused but published a story detailing Mobil's denials of wrongdoing. "I tried to get them to admit their mistakes," Mr. Tavoulareas said later, "but they're so damn arrogant."47 He sued, just as he had sued Harper's magazine two years earlier after the editor described him as "always loud," "a bad actor," and "a Nixon type."48 The Harper's suit was settled. The jury in the Post case brought back a $2.05 million verdict for Tavoulareas.

Professor Smolla concludes that the jury convicted the Post of failure to deliver the promised goods:

The headline, and the unmistakable message communicated between the lines, was that William Tavoulareas had done wrong. The actual text of the Post story, however, did not provide the necessary clinchers. Although the text told both sides of the story, and from the literal words alone one could just as well conclude that Tavoulareas's behavior was perfectly above board and legitimate as that it was insidious and dishonest, all the facts and inferences favorable to Tavoulareas were systematically presented so as to diminish their force. The one firm conclusion that the Post did venture to draw—that Tavoulareas had failed to make disclosures required by federal securities laws—turned out to be inaccurate.49

Steven Brill of The American Lawyer, whose excellent reporting may have influenced the post-trial decisions in the case, reported that the jury had utterly disregarded the law in reaching its verdict.50 Under the leadership of a law-student-to-be, the jury believed it was the newspaper's legal obligation to prove in the article itself that Mr. Tavoulareas had helped his son. The jury concluded that the Post failed to do that. The jury also ignored both the plaintiff's burden to prove falsity51 and the reckless disregard standard for public figures. The jury even seemed to turn libel law upside down by deciding to have the Post give the elder Tavoulareas,

47. Id. at 184.
48. Id. at 185.
49. Id. at 190.
the public figure, $2 million and the younger Tavoulareas, a private figure, nothing.

Like the Tavoulareas case, General Westmoreland's case against CBS was essentially about a report that offered points of view and conclusions as facts. CBS, in a documentary in 1982 called "The Uncounted Enemy: A Vietnam Deception," accused General Westmoreland of suppressing the truth about the strength of communist forces before the Tet offensive in 1968. The theory was that estimates of enemy strength were kept low so that the chance of winning the war would appear more favorable to President Lyndon Johnson and the rest of the folks back home. In fact, there was a fierce debate among intelligence officers over troop counts and how they should be organized, but the documentary simply accepted one side of that debate and couched it in terms of "deception." Unlike the Post, CBS made little pretense of fairness. Filmed interviews, including one with General Westmoreland, were edited to make defenses look almost like confessions.

In another instance, Israeli Defense Minister Ariel Sharon was harshly criticized by an Israeli investigative commission for letting Christian Phalangists enter two Palestinian refugee camps after the Phalangist leader, Lebanese President-elect Bashir Gemayel, was assassinated. The commission's report referred to General Sharon's "blunders" in failing to forestall atrocities. Time magazine published an article about the report. A mistake in the article referred to a secret section of the report, which supposedly included details about General Sharon's visit to the Gemayel family after the assassination. "Sharon," said the Time article, "also reportedly discussed with the Gemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known." General Sharon, testifying in Hebrew before the Israeli commission, said he had discussed the issue of revenge "etslenu," a Hebrew word that can mean either "among us" or "by us". The Time correspondent obviously took the word to mean "by us." General Sharon testified at trial that he meant it as "among us," in the context of a discussion with other Israelis. A language expert testified at the trial for an hour and a half on the meaning of the word. Thus, General Sharon's own testimony certainly was susceptible to Time's interpretation.

52. R. Smolla, supra note 6, at 80.
53. Id. at 81-82.
54. Id.
the other hand, the reporting by the *Time* correspondent, David Halevy, was flawed. The anonymous source who supposedly told him generally about the contents of the secret portion of the report was never actually asked if it contained the statement about revenge. Instead, Halevy extrapolated from the public portion. Then, without any serious discussion with an editor about this conclusion, he simply “cleared” the statement for publication without questioning his source again. As a result, a mere conclusion was stated as fact.55

If the *Tavoulareas* verdict bespoke a jury gone berserk, the *Sharon* verdict bespoke Solomonic wisdom. United States District Judge Abraham Sofaer, who carefully separated the issues for the jury, had everyone in the courtroom stand in tribute to the jury’s wisdom after the final verdict was announced. In serial verdicts, the jury concluded that: (1) the statement in *Time* defamed General Sharon, (2) General Sharon had proven that he had not discussed revenge with the Gemayels, and (3) *Time* did not act with reckless disregard of the truth and therefore was not liable, though correspondent Halevy acted “negligently and carelessly.”56

Professor Smolla poses the broader question raised by these cases in the title of his chapter on the *Tavoulareas* case: “Can Investigative Journalism Ever Be Objective?”57 CBS, *Time*, and the *Post* each had a point of view and in essence were simply making the case to support that view. Objectivity was merely a form, a myth. By relying on the objective form, they deceived their readers and viewers. *Time*, notes Professor Smolla, told readers it had *learned* something “when in fact it had guessed.”58 Bob Woodward addressed the matter in his testimony for the *Post* after Mr. Tavoulareas’ lawyer questioned him on why the name of the Saudi joint venture did not appear until the sixth paragraph of the story:

[T]hat’s what this is all about: you people saying, ‘Gee, we want you to write a story this way, we want this included, we want this included.’ You can write a story a million ways or even more than a million ways. What we do is we process information . . . make it clear. We are trying to be fair and accurate as we were in this

56. R. SMOLLA, supra note 6, at 191-92.
57. Id. at 182.
58. Id. at 96.
story . . . You're asking a question that hinges on your assumption that you guys dictate how it's done.  

The odd thing is that none of the three plaintiffs apparently would have filed suit had the defendants clearly denoted the statements they made as conclusions or opinions. Professor Smolla observes, “What appeared to irk Tavoulareas and the . . . jury was the subtle infiltration of judgmental conclusions by the Post in what . . . purported to be neutral reportage.” It is worth noting that the charges about General Westmoreland had appeared five years earlier in Harper's, which is more clearly a magazine of opinion, and no libel suit resulted.

III. WHERE DO WE GO FROM HERE?

Professor Smolla fails to emphasize one important lesson to be drawn from the cases he describes: A great deal depends on the judge. If the judge is someone like Abraham Sofaer, who presided over the Sharon trial and carefully separated the issues for the jurors, the result is likely to reflect the values and the law set forth in Sullivan. If the judge is someone like Walter B. Jones, who railroaded the New York Times with his disdain for the Constitution, the result is likely to reflect the same kind of emotional press-bashing that the Times suffered in the Alabama courtroom in 1960 and that Tom Wicker saw in the Cow Palace in 1964.

Libel is a lottery for the litigants. The reasons for this are scattered through the case studies in Suing the Press, and a summary of the more common and compelling ones may be useful.

A. The standards of care are vague.

When does a mistake stop being negligence and become reckless disregard for the truth? And what conduct is reckless, anyway? Do we know it when we see it? With such vague concepts, juries are free to find that the standard, whatever it means, is met.

Moreover, if some judges are applying their own personal preferences about the conduct of journalism as the legal standard, the cases will continue to be a lottery. Unless the writer knows whether his judicial editor will be William O. Douglas or Antonin Scalia, he cannot know whether the law requires him to drive two hundred miles to look an interviewee “in the eye.” The more baffling the

59. Id. at 194.
60. Id. at 191.
standard of care, the more likely the sort of jury nullification of the law that occurred in Tavoulareas.

The problem of assessing whether the care was reasonable is compounded by the simple fact that speech or writing, even by professionals, is not always precise or literal. All of us have said or written things that have been misunderstood or have suggested something different from what we meant, or that is not literally true. As Bob Woodward said, newspaper articles can be written a million different ways, and opening them up to reconsideration after years of discovery by lawyers and thorough analysis by linguistic experts is asking more than a "robust" and "uninhibited" press can deliver.61 To some extent, this second-guessing of professional judgment exists in all professional negligence cases, whether it is medical malpractice or libel. The news media, however, are unique in their daily presentation of controversy, whether in news articles or editorials, and in their frequent vilification by the highest officials of government. This increases the likelihood that a juror's feelings toward the news media in general and the defendant news organization in particular will be transported into a verdict on the alleged libel.

B. Damages are almost entirely intangible.

There are rarely medical bills or lost wages in a libel case. A plaintiff is compensated for loss of reputation, which is usually left largely to the speculation of the jurors. Libel also conjures up other sorts of damages that have been controversial in recent tort law. Mental anguish and emotional distress have been compensated even in the absence of any damage to reputation.62 Defamation, it has been said, is the only tort that allows "substantial recovery without proof of injury."63 The type of harm, moreover, can vary. General Westmoreland suffered in his public image but may have lost nothing in his relationships with his friends. A more obscure person might suffer among business acquaintances, but those who did not know him would be unlikely even to remember the libel. Commissioner Sullivan probably won greater esteem among his acquaintances in Montgomery after the Times advertisement ap-

61. Id. at 194.
peared, and people who did not know him would not have con-

nected him with the advertisement.\textsuperscript{64}

C. Damages for an erroneous, defamatory statement are
difficult to separate from damages for true, though harmful,
information presented in the same story.

The \textit{Sharon} case never reached the point of a damages assess-
ment, but it is an example of this sort of case. The \textit{Time} story
accurately reported the harsh assessment of General Sharon by the
Israeli commission investigating the Phalangist massacre. Only one
sentence was really contested. The article without that sentence
was quite enough to significantly damage General Sharon's reputa-
tion, but the magazine had no liability for that. General Sharon
could recover only for the \textit{additional} harm caused by the one in-
correct sentence. The tone of the advertisement at issue in \textit{Sulli-
van} was likewise harsh and, at least outside the South, might have
significantly damaged the reputations of Alabama officials gener-
ally. The errors, however, made little difference. Did it matter that
the officials arrested Martin Luther King four times instead of
seven, or that police were at the college campus in abundance but
did not literally "ring" it, or that the cause of the demonstration
was slightly different, or that the song was incorrectly identified?
Because the libel case focuses on one or two or even a half-dozen
errors, those errors take on extraordinary importance to the jurors
and are valued, for purposes of a verdict, out of all proportion to
their weight in the total article.

D. Opinion loses some of its protection when presented as a
statement of fact.

At first blush, this may seem perfectly acceptable; news organi-
izations should clearly indicate that they are expressing opinion
and not truth. That would not conform, however, to the way all of
us act. We may believe some things so strongly that we take them
as fact or express them as such. Mary McCarthy's statements
about Lillian Hellman fall into this category. So would Mike Wal-
lace's statement that General Westmoreland "deceived" the Amer-
ican people. Holding publishers and speakers liable for expressing

\textsuperscript{64} See id. at 764-66.
“ideological facts,” as Professor Smolla calls them, is simply punishing them for expressing their ideas.\textsuperscript{65}

Satire\textsuperscript{66} and “docudramas”\textsuperscript{67} likewise state as fact what often is fictionalized, but those are yet another form—increasingly popular—of presenting ideas and theories. The film Missing, for example, was based on the real disappearance of a young American writer in Chile and his father’s belief that the United States played a role in the disappearance. The movie was political and reflected intense anger, but it clearly had to fictionalize scenes (without so indicating) where facts were not known. The American ambassador, protesting his innocence, sued for libel.\textsuperscript{68} We may never know who is right. Does that mean that a filmmaker is not free to speculate on the basis of the evidence and his conclusions from it, or does it mean that filmmakers can’t go around smearing officials’ reputations on the basis of speculation alone?\textsuperscript{69}

The law cannot be a literary critic. Just as it has no place judging Mary McCarthy’s stinging remarks about Lillian Hellman, it cannot become the arbiter of literary and journalistic forms. It is one thing for a jury to say that a newspaper will be guilty of libel if it simply makes up a story that a famous actress was boisterous and drunk in a fashionable restaurant. It is quite another thing to say that historical novels and “docudramas,” if not true in every particular or if accepting a controversial view of history, can subject the writer to a libel suit.


\textsuperscript{66} See, e.g., Pring v. Penthouse Int’l, Ltd., 695 F.2d 438 (10th Cir.), cert. denied, 462 U.S. 1132 (1983); see also R. Smolla, supra note 6, at 163-64.

\textsuperscript{67} R. Smolla, supra note 6, at 138-59.

\textsuperscript{68} Davis v. Costa-Gavras, 580 F. Supp. 1082 (S.D.N.Y. 1984). The ambassador sued the author and publisher of the book on which the movie was based, as well as the filmmakers, seeking $150 million in damages. The court granted motions for summary judgment in favor of the author and publisher. Id. The court ultimately granted the filmmakers’ motion for judgment on the pleadings, finding the film not reasonably susceptible to the defamatory meaning alleged in the complaint. Davis v. Costa-Gavras, 619 F. Supp. 1372 (D.C.N.Y. 1985).

\textsuperscript{69} In such a case, where the facts are simply unknowable, the Supreme Court seems to give the advantage to the media defendant. The Court recently held that plaintiffs have the burden of proving falsity and noted that burden of proof “is the deciding factor only when the evidence is ambiguous.” Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1560 (1986). This presumably means that the film Missing, even if its entire premise is false, would be protected from a libel verdict, although the Court reserved ruling on whether Philadelphia Newspapers applies to nonmedia defendants. Id. at 1565 n.4.
Daily journalism surely needs improvement. Its most fundamental need is not, as some might argue, greater "objectivity" but rather greater understanding. For all the talk about the aggressiveness of the Sam Donaldsons and Mike Wallaces there is little to government coverage, at any level, besides a description of daily events, many of which are staged for the specific purpose of attracting news coverage. Too many newspaper articles are breathless scoops. Their tone is one of shock that something occurred or was discovered, not exploration of how it occurred or explanation of what it is all about. Reporters as a group, often accused of being "liberal," are in truth populists, susceptible to the same emotional cliches that motivate the general population. Few of them are confident enough of their own depth of knowledge on a subject—or possess sufficient depth of knowledge on a subject—to cast off the journalistic conventions of "objectivity," which so bogged down the Post in the Tavoulareas story, and to move past the contentious rhetoric of opposing sides into a more insightful, indeed more truthful, explanation. (Those who complain that the press thrives on conflict do not realize the constraints of "objectivity." If President Reagan offers a statistic that is utterly incorrect, a reporter is loathe simply to write, "The President was wrong, and here is the real figure." The reporter must seek out a prominent Democrat and quote him as saying the President was wrong.) Journalists are more intelligent and better trained than they were in Front Page days, but many of the leading lights of journalism still see a need for more rigorous analysis, more thorough explanations, and more dispassionate judgments.70

Journalists who read Suing the Press should appreciate this need. Looking past the legal issues in Westmoreland and Sharon and other cases discussed by Professor Smolla, a journalist must recognize that there were serious failings of craft in the articles involved. Correcting the problem will require not timidity but more aggressiveness.

Lawyers and judges who read Suing the Press should come to realize that every harm resulting from errors of speech and press is not compensable through libel awards. They must also recognize that jurors and judges—to say nothing of lawyers—are being smothered by the complexity, vagueness, and uncertainty of libel law. Judges, particularly, need to realize that libel is not just another tort, but that it infringes on a basic human need to speak

one's mind and a fundamental constitutional protection that lets people do it.

Suing the Press offers few specific answers to the libel conundrum, but it contributes to understanding on both sides.