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# PUNITIVE DAMAGES IN LIBEL CASES—FIRST AMENDMENT EQUALIZER?

JEROME A. BARRON\*

## INTRODUCTION

Several years ago in a lecture at Suffolk University Law School, I spoke about libel law in the United States as having become, in default of the creation of more suitable remedies, a means of securing media accountability. I also discussed the role of punitive damages in particular as an enabler. Punitive damages enabled individuals believing themselves to have been wronged by the media to do battle with the media. In such circumstances, I suggested that punitive damages serve as an equalizer.<sup>1</sup> Megaverdicts become the remedy for injury that megamedia inflicts. In my previous essay I was chiefly concerned with the merits of a right of reply statute as an alternative to damages in defamation cases. I did not then develop the special role that punitive damages have assumed in recent years in libel cases—the role of first amendment equalizer. I shall attempt to do that now.

Punitive damages in defamation cases continue to be a subject of criticism in the law reviews.<sup>2</sup> Yet mysteriously such damages survive. Their domain, much diminished by *Gertz v. Robert Welch, Inc.*,<sup>3</sup> was surprisingly

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I wish to thank my colleague Tom Dienes for many helpful suggestions and criticisms on this essay. Although I was not able to persuade him of the merits of a first amendment case for punitive damages, he was able to persuade me of a number of important issues that merited thought and consideration in this area.

1. See Barron, *The Search For Media Accountability*, 19 SUFFOLK U.L. REV. 789, 792 (1985). The article was based on the Seventeenth Donahue Lecture, delivered at Suffolk University Law School on October 24, 1985.

2. See Van Alstyne, *First Amendment Limitations on Recovery From the Press—An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 793, 804-09 (1984) (for extremely critical discussion of role of punitive damages in libel cases). Professor Van Alstyne suggests a variety of procedural changes in the manner libel cases involving punitive damages are tried. These include using the beyond a reasonable doubt standard of proof or applying "the procedural safeguards of a criminal libel trial." *Id.* at 806-07. Conceding the further complexing these proposals portend for the already complex law of libel, Professor Van Alstyne concludes: "Still, rather than move to these very vexing notions, it may be better to discontinue punitive damages in civil libel cases completely." *Id.* at 807. See also Comment, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 (1985). This Comment does not advocate the abolition of punitive damages in libel cases but would make them more difficult to obtain by requiring public figures "to prove common law malice as well as actual malice before they can collect punitive damages for libel." *Id.* at 862.

3. 418 U.S. 323 (1974).

enlarged once again only four years ago in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>4</sup>

Even more recently, the issue of the constitutionality of punitive damages *vel non* has occupied center stage on the legal scene as a result of the Supreme Court decision in *Browning-Ferris Industries, Inc. v. Kelco*.<sup>5</sup> As is well known by now, Justice Blackmun in *Browning-Ferris* declined to disturb "the jury's punitive damages award."<sup>6</sup> The jury verdict awarded the defendant \$51,146 in compensatory damages and \$6 million in punitive damages.<sup>7</sup>

The enormous punitive damages recovery left undisturbed in *Browning-Ferris* was preceded by the Court's refusal a year earlier in *Bankers Life & Casualty Co. v. Crenshaw*<sup>8</sup> to disturb a punitive damages award for \$1.6 million. The recoveries left secure in these two cases would on their face appear to suggest that punitive damages will continue to have an important place in American law. Nonetheless, commentators have suggested that the long-term implication of *Browning-Ferris* is that punitive damages may yet be held subject to constitutional review. Torts expert Professor Gary Schwartz writes:

After *Browning-Ferris*, we know that two of the Court's justices—Justices O'Connor and Stevens—believe that excessive punitive damages violate the Excessive Fines Clause; in addition, two other justices—Justices Brennan and Marshall—evidently believe that grossly excessive punitive damages can violate the Due Process Clause. This adds up to four votes on behalf of the idea that the Constitution does place substantive limits on the size of punitive damages awards.<sup>9</sup>

Professor Schwartz believes it a reasonable prediction that at least one of the five justices<sup>10</sup> who have not yet declared themselves on the constitutional reviewability of punitive damages "will, in some appropriate future case, affiliate" with the Brennan position that punitive damages are subject to review under a substantive due process analysis.<sup>11</sup> Professor Schwartz concedes that the refusal of these five to join Justice O'Connor's "plausible" position in *Browning-Ferris*<sup>12</sup> contradicts his position. Justice O'Connor, of course, contends contrary to the Court majority that the Excessive Fines Clause of the eighth amendment does extend to punitive damage awards in

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4. 472 U.S. 749 (1985).

5. 109 S. Ct. 2909 (1989).

6. *Id.* at 2923.

7. *Id.* at 2913.

8. 108 S. Ct. 1645 (1988).

9. See Schwartz, *Browning-Ferris: The Supreme Court's Emerging Majorities*, 40 ALA. L. REV. 1237, 1248 (1989).

10. The five Justices are White, Blackmun, Rehnquist, Scalia, and Kennedy. Schwartz, *supra* note 9, at 1248.

11. Schwartz, *supra* note 9, at 1249.

12. *Id.* at 1249 n.51.

a suit between private parties.<sup>13</sup> The refusal of the five Justices, who have not declared themselves on the constitutional reviewability of punitive damages, to rally to this view, Professor Schwartz suggests, may demonstrate "an underlying prudential preference to avoid the constitutionalization of punitive damages."<sup>14</sup>

#### PUNITIVE DAMAGES AND THE FIRST AMENDMENT—A CHILLING EFFECT?

Neither *Bankers Life* nor *Browning-Ferris* raised or discussed punitive damages in a first amendment defamation context. Is the first amendment status of punitive damages a special case? In the brief filed by Floyd Abrams and his colleagues with the Ninth Circuit in *Newton v. NBC*—a case where *after* remittitur the court entered judgment for \$5,000,000 in punitive damages—the first amendment stand against punitive damages is stated with economy and clarity:

Exposing the press to massive and unpredictable awards of punitive damages will inevitably chill the vigor of reporting on important public issues. When huge punitive awards are rendered by juries that routinely function without standards or guidelines the risks of injustice are grave enough; when juries render their awards in the context of First Amendment-protected activities, the risks of injustice in public figure libel cases should be held unconstitutional.<sup>15</sup>

The contention is that given the lack of any limitation on their outer limits, punitive damages chill free expression. This proposition is the heart of the first amendment assault on punitive damages. It is not a new assault. In 1989, a report of the Association of the Bar of the City of New York declared:

Significant constitutional considerations suggest that there should be no role for punitive damage awards under our system of free expression—not even the deterrence or punishment of knowingly or recklessly false speech.<sup>16</sup>

What were the constitutional considerations that suggest precluding punitive damage awards under our system of free expression? The uncer-

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13. See *Browning-Ferris, Inc. v. Kelco*, 109 S. Ct. 2909, 2924 (1989).

14. Schwartz, *supra* note 9, at 1249 n.51. Professor Schwartz also adds that his "prediction" is based on the assumption of no change of membership on the Court. *Id.* at 1249 n.52.

15. Brief of Appellants, *Carson Wayne Newton, a/k/a Wayne Newton, Plaintiff-Appellee v. National Broadcasting Company, Inc., a Delaware Corporation, Brian Elliot Ross, Ira Silverman, and Paul Greenberg*, Appeal from the United States District Court for the Central District of California (No. CV-88-05848 MDC (JRx)). See *Newton v. NBC*, 677 F. Supp. 1066 (D.C. Nev. 1987).

16. See *Report of the Committee on Communications Law on Punitive Damages in Libel Actions*, 42 Rec. of the Ass'n of the Bar of the City of New York 20, 21 (1987) [hereinafter *Report*].

ainties associated with punitive damages created "a risk of self-censorship." Could this be proved? No, it could not be proved. But it was "likely" that this risk was the case:

It is difficult to marshal empirical evidence as to the 'chilling' effect of the prospect of six-, seven- and eight-figure damage awards, with significant punitive damage components. Yet, these awards undoubtedly do not go unnoticed in newsrooms and editorial offices. Although libel defendants have often succeeded in overturning jury awards of punitive damages, the costs of even successful defenses of libel actions—which we believe are increased substantially by the prospect of large punitive awards—can be significant, and even ruinous for smaller media entities and individuals. It is likely that the desire of the media, in particular, to avoid such costs itself deters protected speech.<sup>17</sup>

The foregoing is hardly a devastating position for the argument that punitive damages in defamation cases chill free expression. The point is that it is probably difficult to make a devastating case either way. As Professor Sunstein has observed in the context of a slightly different *New York Times v. Sullivan*<sup>18</sup>-type issue: "Arguments about chilling effect operate at too high a level of generality to solve the particular question. In the abstract, they threaten to do away entirely with the tort of defamation, and no one seems to want to go that far."<sup>19</sup>

There is more to say about the chilling effect dimension of the punitive damages issue than that it is unprovable. One way of deflecting the chilling effect argument has been to say that since punitive damages are awarded only when actual malice has been proved, the speech that is inhibited is by definition speech which has been ruled to be unprotected expression. The Ninth Circuit took this approach in *Maheu v. Hughes Toolco.*<sup>20</sup> In *Maheu*, Judge Duniway conceded that the United States Supreme Court had "shown a dislike for the use of punitive damages in cases involving First Amendment rights," but he declared that the Court had left open the question whether punitive damages "can be awarded in situations in which the high and protective standard of actual malice has been met."<sup>21</sup> The Ninth Circuit in *Maheu* then examined a number of federal appellate decisions. The tenor of these decisions is illustrated by the approving summary in *Maheu* of *Appleyard v. Transamerican Press, Inc.* on the question of the first amendment validity of punitive damages where actual malice has been shown.<sup>22</sup> *Maheu* summarized *Appleyard* as follows:

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17. *Id.* at 22.

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

19. See Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891, 896 (1984).

20. 569 F.2d 459 (9th Cir. 1977).

21. *Maheu v. Hughes Toolco.*, 569 F.2d 459, 478 (9th Cir. 1977).

22. 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

Finally, in *Appleyard*, . . . the Fourth Circuit specifically refused to follow the district court's opinion in this case and concluded that the prevention of any chilling effect had little application where *New York Times* malice had been shown.

In such a situation, "there is no good-faith attempt to point out real abuses to the public," rather "[t]here is only an unsubstantiated attack on the character, reputation and good name of a particular individual."<sup>23</sup>

Relying on *Appleyard* and other cases, the Ninth Circuit in *Maheu* concluded that "punitive damages are permissible once actual malice as defined in *New York Times* has been established."<sup>24</sup> One way to avoid the first amendment, or more specifically, the "chilling effect" issue presented by awards of punitive damages in libel cases is to deny its application in cases where actual malice has been shown. This mode of avoiding the first amendment issue continues to persist in the caselaw. Thus, in *Brown & Williamson Tobacco Corp. v. CBS, Inc.*,<sup>25</sup> where the court upheld \$2,000,000 in punitive damages against CBS, the Seventh Circuit observed:

[W]e are forced to conclude that this case does not involve freedom of the press. Rather, it is one in which there is clear and convincing evidence that a local television journalist acted with actual malice when he made false statements about Brown & Williamson Tobacco Corporation. Because false statements of fact made with actual malice are not protected by the First Amendment, this court is required to affirm the district court's finding that Jacobson and CBS libeled Brown & Williamson.<sup>26</sup>

Given the vast wealth of a media defendant like CBS, and the proven injury, the punitive damages did not seem excessive to the Seventh Circuit in *Brown & Williamson*. Yet given the magnitude of the punitive damage award in *Brown & Williamson*, the failure of the Supreme Court to grant certiorari in that case is puzzling. Perhaps the Court was not prepared to consider the first amendment invalidity of punitive damages where the media defendant clearly acted with actual malice.

The Supreme Court has used a similar approach to respond to first amendment arguments made with regard to other categories of defamatory speech. In *Dun & Bradstreet*<sup>27</sup> Justice Powell justified the Court's refusal to reverse an award of punitive damages by a Vermont jury. The reason? The plaintiff was a private figure and the defamation did not involve a matter of public concern. Justice Powell observed: "We have long recog-

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23. *Maheu*, 569 F.2d at 479.

24. *Id.* at 480.

25. 827 F.2d 1119 (7th Cir. 1987).

26. *Brown & Williamson Tobacco Corp. v. CBS, Inc.*, 827 F.2d 1119, 1143 (7th Cir. 1987).

27. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

nized that not all speech is of equal First Amendment importance."<sup>28</sup> Speech on "matters of purely private concern is of less First Amendment concern."<sup>29</sup>

The foregoing cases respond to the chilling effect or first amendment argument against punitive damages in libel cases in an entirely unsatisfactory way because the response is tautological. Expression is unprotected expression only because a court ultimately holds it so. (The same may be said of the question of who is a private figure or what constitutes private as compared with public speech.) False statements of fact made with actual malice is hardly a discrete, easily identifiable, and unmistakable category of speech. Indeed, trial courts and appellate courts frequently disagree as to whether or not false statements of fact were published with actual malice. False statements of fact published with actual malice is a far less discrete category of speech than "obscenity" for example, and the parameters of the category of expression are not always clear.

The journalist must publish before the fact—before a court has determined whether a false statement of fact was made with actual malice. Thus, at the most critical time as far as the journalist is concerned—the time of publication—the chilling effect, if one exists, is hardly minimized by the fact that ultimately a court concludes that the defamation at issue was published with actual malice.

#### ANOTHER SIDE OF THE CHILLING EFFECT ISSUE

Having discussed one point of view concerning the chilling effect of punitive damages in libel cases, I wish to stake out another position in the continuing debate. Usually, discussions about chilling effect of punitive damages in libel cases assume that the chill is always on the media speaker. But the increasing unavailability to the public person, whether public official or public figure, of successful recourse to the libel law works a chill of its own, and it is against this background that the continued efficacy of punitive damages in libel litigation should be considered.

Has the libel regime ushered in by *New York Times Co. v. Sullivan* worked to the disadvantage of American public life? Has it driven out, or more important, inhibited from entering public life all but the hardened and tough-skinned? It is not possible to number those, however talented and public-spirited, who choose not to withstand the pitiless, constant, and often scurrilous scrutiny that is today the lot of those who participate in American public life. The transformation of American libel law in favor of the media defendant may not have depopulated public life of the wise, the virtuous, and alas, the sensitive, but to paraphrase Professor Sunstein, there is no assurance that it has not either. Certainly the evisceration of state libel law accomplished by *Gertz* may have had some impact on those who choose to enter public life. As *Gertz* made abundantly clear, those who

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28. *Id.* at 758.

29. *Id.* at 759. See also *id.* at 757 n.4.

advisedly choose to enter public life waive many of the traditional protections of state libel law.

From a historical perspective, it is good to contrast this with an earlier period in American history. Libel historian Norman Rosenberg writes that in the nineteenth century the chilling effect on the press of punitive damages and the libel law generally was well understood, but the connection between freeing the press from a chilling effect only to cast an equivalent chill on public life seems to have been better understood then than now. Thus Professor Rosenberg writes with respect to the reaction in the late nineteenth century to the chilling effect of the libel laws:

The chilling effect of libel laws was not a discovery of twentieth-century judges and First Amendment scholars; nineteenth-century commentators recognized that tough defamation laws encouraged self-censorship, and greater self-censorship was precisely what most late nineteenth-century lawmakers wanted, especially in libels involving the reputations of the best men.<sup>30</sup>

Professor Rosenberg said that in the late nineteenth century attention was directed to discouraging libelous falsehoods rather than to encouraging vigorous and robust public debate in the *New York Times* sense. Reformers, he writes, "sought to rationalize and professionalize public affairs."<sup>31</sup> This reformation effort "demanded that irresponsible newspaper stories not mislead voters into rejecting re-form candidates or losing confidence in capable public officials."<sup>32</sup> Indeed, leaders of the bar in that era were instrumental in staving off efforts by state legislatures to prohibit punitive damages.

Viewed from this vantage point, the role of punitive damages reduces the chill on public debate and public persons that the *Times-Gertz* doctrines may have cast on public life. People may believe that if they enter public life or public debate they themselves will be open to attack. The decision to enter public life in such circumstances is akin to the decision that the criminal defendant must consider in pondering whether to testify at trial. Entering the vortex opens one's whole life to impeachment by the media, and that opening is without recourse. It is increasingly a fact of life for the public person that the libel law can rarely be relied on to rescue those who are technically defamed. The surprising survival in such a legal climate of punitive damages may serve to even out things. The survival of punitive damages in libel cases suggests that the public person is not totally without recourse to false and baseless attacks. Barry Goldwater's punitive damage recovery against media defendant Ralph Ginzburg—rare as it is—is illustrative.

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30. Rosenberg, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 199-200 (1986).

31. *Id.*

32. *Id.*



## EQUALIZING THE OPINION PROCESS AND PUNITIVE DAMAGES

At least from the media perspective, one aspect of the assault on punitive damages in defamation cases merits some re-examination. This aspect is the idea that the first amendment significance of the punitive damages issue is found only on the media defamation defendant's side of the line. As the report of the Association of the Bar of the City of New York states, the "dramatic increase" in punitive damage awards in libel cases is "unwarranted in terms of any countervailing interests in preserving individual reputation."<sup>33</sup>

Let us explore this no-countervailing-interest argument by asking a heretical question: is there a first amendment function to the award of punitive damages in libel cases from the *plaintiff's* point of view? My answer to this question is yes. In my view, the present campaign against punitive damages in libel cases is attributable precisely to the fact that these damages *do* in fact serve countervailing interests. These countervailing interests include not only the preservation of reputation but the equalization of the opinion process as well. The potential of punitive damages, no matter how ultimately unrealized, gives heart and strength to the non-media speaker in the opinion process. I believe that this proposition is evident on the face of the report of the Association of the Bar of the City of New York, which charged that no countervailing interest is served by punitive damages. Thus, the report states that large punitive damage recoveries deter settlement, encourage "the bringing of libel suits, whatever their merits," and obliges the news media to devote "substantial resources to the defense of even tenuous actions." The response to all this, of course, is—exactly right.

Punitive damages in their very standardlessness and the random possibility they present of a big win encourage those attacked or criticized by the media to undertake litigation against the media. Winning and keeping a punitive damage judgment in a libel case is as unlikely and yet as alluring as winning the state lottery. Punitive damages encourage legal battles with the media that otherwise might not occur. Punitive damages are used as an awkward but nonetheless powerful means of coping with the fine-tuned complexities of the *Times-Gertz* rules. These rules constitute a minefield for the plaintiff's libel lawyer, and it is a rare libel plaintiff who survives a walk through that field. The remedy that prompts the brave among them to try is punitive damages. Understood from this perspective, the present campaign against the first amendment validity of punitive damages makes sense. Punitive damages are virtually the last weapon left to the libel plaintiff.

Viewing the use of punitive damages by a libel plaintiff from a first amendment perspective, two first amendment functions can be served. First, punitive damages encourage speech by non-media speakers who might otherwise remain silent. Since occasionally a libel plaintiff does win and

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33. *Report*, *supra* note 16, at 20.

keep a punitive damage award in a libel case, the public person is emboldened to speak despite the threat of media attacks operating behind the shelter of actual malice. Second, the scale of punitive damages may provide precious entry into the opinion process. Libel litigation thus itself becomes a forum. The sheer size of the damages sought and the possibility, however slight, that they may be won are used to communicate the ideas of the libel plaintiff. Paradoxically, punitive damages can thus play a first amendment function in opening up a debate which otherwise might not take place. Punitive damages may attract media attention for the ideas of the libel plaintiff that otherwise might not be obtainable.

It is understandable that punitive damages are anathema in the media. But this arena is not the only area where punitive damages are friendless. It is my observation that punitive damages in defamation cases have very few well-wishers in academe. Mention of punitive damages here as elsewhere evokes inevitable concerns about "chilling effect" and "self-censorship."<sup>34</sup> Yet it is particularly among legal academics that one would hope the present function of punitive damages in contemporary libel litigation would be understood. Simply stated, punitive damages—at least for a moment—make the weak strong and give a voice to the silent. The potential size of the punitive damage remedy serves to accomplish at least a modicum of media accountability.

The punitive damage claim is well understood to be a longshot by all who assert it. But some longshots do come through. Barry Goldwater and Elmer Gertz can give memorable testimony to that. In these famous cases plaintiffs won substantial punitive damages despite the formidable strictures of the *Times* doctrine. Yet it is interesting that these cases do not discuss the now so current issue of whether the first amendment should be read to prohibit or limit problems with the award of punitive damages in libel cases. In *Goldwater v. Ginzburg*,<sup>35</sup> Barry Goldwater, an elected public official running for the Presidency, the nation's highest elective office, won a total of \$75,000 in punitive damages against a media defendant despite the new hurdles imposed by the *Times* doctrine decided five years earlier.<sup>36</sup> As a

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34. I do not mean to suggest that these concerns about "chilling effect" are baseless. I argue only that the "actual malice privilege" has a "chilling effect" as well. The cold wind blowing from punitive damages on media expression should be evaluated in terms of the cold wind blowing from the "actual malice" privilege on individual expression. Professor Van Alstyne made a strong defense of the "chilling effect" of punitive damages on the media in libel cases. In addition, he argues that the available legal means for correcting injustices in the awards of punitive damages are inadequate: "Remittitur is thus almost always an insufficient response. Indeed, the chilling effect on publishers who have reason to be apprehensive of being caught by the jury, policed only by the discretion of judges to reduce damages in such measure as the judges then think appropriate, is still intolerable. For all that one can know, the judges may themselves still sustain very sizeable punitive damages awards reflecting in part their own understandable, but constitutionally improper, distaste for the defendant's publication." See Van Alstyne, *supra* note 2, at 808.

35. 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

36. *Goldwater v. Ginzburg*, 414 F.2d 324, 342-43 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

consequence of the litigation that ensued on remand from the Supreme Court decision in *Gertz v. Robert Welch, Inc.*,<sup>37</sup> Welch received \$100,000 compensatory damages and \$300,000 in punitive damages.<sup>38</sup> Here again the court of appeals did not discuss the first amendment problems presented by punitive damage awards in libel litigation. The court of appeals was concerned about the injury to Gertz's reputation and the unmistakable proof of actual malice:

In summary, Stanley [a writer for the media defendant] conceived of a story line; solicited Stang, a writer with a known and unreasonable propensity to libel persons or organizations as Communist, to write the article; and after the article was submitted, made virtually no effort to check the validity of statements that were defamatory *per se* of Gertz, and in fact added further defamatory material based on Stang's 'facts.' There was more than enough evidence for the jury to conclude that this article was published with utter disregard for the truth or falsity of the statements contained in the article about Gertz. "Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) . . . (Warren, C.J., concurring).<sup>39</sup>

This article really has two themes. The first is that punitive damages in a limited way perform an equalizing role in the contemporary opinion process. Because punitive damages enhance the size of the *ad damnum*, they attract media attention, and therefore, grant access to the libel plaintiff who in fact may be bringing suit not in pursuit of damages but merely in hopes of securing some coverage for his side of the story. In a sense, then, punitive damages provide a way of entering the opinion process for the libel plaintiff. As we all know, in the main libel plaintiffs lose. If they win at trial, the great majority lose on appeal. As a rule, libel plaintiffs do not win—much less win punitive damages. The second theme of this article is that the punitive damages issue in libel litigation cannot be treated in isolation.

#### CONSIDERING PUNITIVE DAMAGES IN CONTEXT

If the status of punitive damages in libel litigation merits reform, such reform must be considered in context. Reform must be considered in terms of a reform of the whole of libel law, particularly the public law of libel created by *Times* and *Gertz*. A reform of present day libel law that *only* abolishes or severely limits punitive damages will exacerbate the underlying sense of grievance against the media, which prompts the large claims and verdicts for punitive damages that are the source of so much anxiety.

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37. 418 U.S. 323 (1974).

38. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982).

39. *Id.* at 539.

Two pervasive feelings within society feed this sense of grievance. The first feeling is that the contest between the press and its quarry is inherently unequal. The second feeling is that the resources of the media giant can too easily overwhelm the person who chooses to fight. These feelings animate juries as well as others. Thus it is that in twentieth century America we experience the obverse of the pattern in eighteenth century America. The jury is now sometimes seen not as the editor's friend but as his foe. The jury is often viewed by the media defendant not as a rescuer but as an enemy. These reactions will only intensify if the present tendency of the libel law to favor the media defendant above all others is continued to the point of depriving the libel plaintiff of even the possibility of a remedy in punitive damages. The battle terrain will merely shift from punitive damages to actual damages.

There is now considerable literature on ways to reform the libel law. Proposals such as vindication statutes and right of reply alternatives to actions for defamation damages have been made with increasing frequency.<sup>40</sup> These proposals have failed to win acceptance. Until they do, a flat prohibition on punitive damages is not reasonable. The balance struck in *Sullivan* between free press and reputation has been refined now to the point that it is weighted far more heavily in favor of the media defendant than was the case at its inception.

The role of punitive damages in libel cases has become a major source of controversy. In a sense, punitive damages are one of the last pieces of heavy artillery left in the dwindling arsenal of the libel plaintiff. The media-oriented *Report of the Libel Reform Project of the Annenberg Washington Program* [hereinafter *Annenberg Report*] proposed a comprehensive Libel Reform Act. Section 9(d) of the proposed Act states: "No punitive damages shall be permitted in any action for defamation." The explanation the report provides for its proposed abolition of punitive damages concisely states most of the reasons found in the literature and the caselaw against punitive damages in libel cases:

Punitive damages act as an excessive chill on free expression and may be devastating to the defendant. In addition, such awards bear no relation to reality, sometimes serving to vent distaste for the nature or character of the defendant instead of fulfilling any rational interest in deterrence. Compensatory damages for defamation are already highly subjective and may even contain a hidden punitive component. To permit additional punitive damages, there-

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40. See, e.g., Hulme, *Vindicating Reputation: An Alternative to Damages As a Remedy for Defamation*, 30 AM. U.L. REV. 375 (1981); Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983); Le Bel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779 (1984); Barton, *supra* note 1; Franklin, *A Declaratory Judgment Alternative To Current Libel Law*, 74 CALIF. L. REV. 809 (1986); Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan In Its Proper Place*, 101 HARV. L. REV. 1287 (1988).

fore, may punish the defendant twice and provide the plaintiff with a windfall grossly out of proportion to actual injury.<sup>41</sup>

The windfall aspect of punitive damages and their chilling effect on free expression are familiar criticisms. Interestingly enough, these concerns do not disappear even if punitive damages are abolished. The mental distress element of actual damages can support a libel action even if there is no provable reputational harm, inviting the possible award of what are essentially punitive damages under the guise of actual damages.<sup>42</sup> Consequently, even if punitive damages are abolished, the "chilling effect" problem so worrisome to the media defamation defendant still endures.

An additional criticism the *Annenberg Report* offers against punitive damages is their lack of proportionality, *i.e.*, the damages are not proportional to the injury suffered. Yet the Annenberg Project's response to this purported proportionality problem is to mirror the very defect the Project criticizes. Instead of proposing that punitive damages be proportional to the injury suffered, the Annenberg Libel Reform Act proposes that punitive damages be abolished altogether.

The law on punitive damages in libel cases should not be changed either as a matter of constitutional interpretation or through legislation until the libel law as a whole is overhauled. Virtually every revision among all the numerous revisions of the libel law that have occurred since the development of the *Sullivan* doctrine has changed the law at the expense of the libel plaintiff and for the benefit of the libel defendant, particularly the media libel defendant. It is an anomaly that the army of media lawyers and the academic chorus that surrounds them with a constant first amendment benediction does not perceive any relationship between the transformation of American law in favor of the libel defendant and the resort to punitive damages by libel plaintiffs. The juries, however, understand this relationship.

The rise of the megaverdict is a desperate effort to achieve a balance of power in the libel wars. The ability of libel plaintiffs in a few rare cases to obtain punitive damages is the last redoubt left. In 1985 Justice White, concurring in *Dun & Bradstreet*, wrote a biting critique of the *New York Times Co. v. Sullivan* doctrine declaring that he had become convinced that the Court had "struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation."<sup>43</sup>

41. *The Report of the Libel Reform Project of the Annenberg Washington Program* 25 (1988).

42. Considerations like these prompted Professor Anderson's proposal: "[C]ompensating individuals for actual harm to reputation is the only legitimate purpose of defamation law today. Proof of such harm, therefore, should be required in every libel or slander case. By actual harm, I mean provable injury to reputation. Nonpecuniary reputational losses would qualify, but mental anguish alone would not." (emphasis in original). Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 749 (1984).

43. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985).

In the course of that discussion, Justice White set forth some of the hurdles that the public official libel plaintiff, bound by the *New York Times-Gertz* rules, encounters. The public figure plaintiff faces these hurdles as well. A public official plaintiff is not able to recover in defamation if he proves falsity despite the fact that the Supreme Court has said there is no first amendment value in a false statement of fact. Justice White summarizes the situation as follows:

Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. . . . *Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. . . . Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality.* (Emphasis supplied.)<sup>44</sup>

Elsewhere in his concurrence in *Dun & Bradstreet* Justice White observed that the abolition of punitive damages might have been preferable to the rules of the *Times* doctrine:

In *New York Times*, instead 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. Punitive damages might have been scrutinized as Justice Harlan suggested in *Rosenbloom*, or perhaps even entirely forbidden.<sup>45</sup>

The Libel Defense Resource Center (hereafter LDRC) has observed that "of the 19 Justices who have sat on the Court since *Sullivan* . . . fully 16 have either written opinions stating . . . concerns [about punitive damages in libel actions] (9 Justices) and/or have joined in those opinions (7 Justices)."<sup>46</sup> The *LDRC Bulletin* noted that "even Justice White" suggested in his concurrence in *Dun & Bradstreet* that a prohibition of punitive damages in libel cases might be preferable to the *New York Times* actual malice test now in force.<sup>47</sup> White is quoted in the context of an analysis of whether the current Justices on the Court would support a first amendment based prohibition on punitive damages in libel actions. The point of White's

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44. *Id.* at 767-68.

45. *Id.* at 771.

46. LDRC Status Report and Roundtable Discussion, *Punitive Damages in Libel Actions*, 24 LDRC Bulletin 5 (1988).

47. *Id.*

remarks, however, was not that punitive damages should be prohibited *in vacuo*, but that this prohibition should be substituted for the present complexities of the *Times-Gertz* rules—weighted as they are against the public plaintiff.

Justice White's views on punitive damages in *Dun & Bradstreet* are part of a critique of the *Times-Gertz* doctrines in their entirety, but the full implications of this critique are rarely highlighted. Thus, libel lawyers Marshall Nelson and Camron deVore in an essay on the constitutional invalidity of punitive damages in libel cases described Justice White's position as a suggestion that "presumed and punitive damages might be prohibited altogether as an alternative means of constitutional protection in lieu of the *New York Times* rule."<sup>48</sup>

Justice White's views on punitive damages in the defamation context should be viewed against the background of the remarks he made about punitive damages in his *Gertz* dissent.<sup>49</sup> In *Gertz* he did not protest the award of punitive damages in defamation cases, but instead Justice White protested the majority's new rule that actual malice should be required for the award of punitive damages:

The Court again complains about substantial verdicts and the possibility of press self-censorship, saying that punitive damages are merely 'private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.' But I see no constitutional difference between publishing with reckless disregard for the truth, where punitive damages will be permitted, and negligent publication where they will not be allowed.<sup>50</sup>

Justice White believed that negligence no less than actual malice could be a basis for the award of punitive damages. Indeed, one consequence of *Dun & Bradstreet*, in which Justice White concurred, was to restore part of the pre-*Gertz* law. After *Dun & Bradstreet*, a private plaintiff in a matter not of public concern can recover general and punitive damages without proving actual malice. Indeed, that was the fact pattern of *Dun & Bradstreet* itself. Justice White was pleased to see *Gertz* narrowed. But he said it was news to him that *Gertz* was intended to apply only to the private defamation plaintiff when the defamation involved matters of public concern.

In his dissent in *Gertz*, Justice White made some observations in defense of punitive damages. He addressed himself to what today would be called the lack of proportionality argument—the contention that punitive damage awards by juries bear no relationship to the actual harm suffered by the libel plaintiff. Justice White denied there was empirical evidence to substantiate this charge.

Furthermore, Justice White pointed to various features of state law that helped to minimize and limit punitive damages. These state law character-

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48. *Id.* at 34.

49. *Gertz v. Welch*, 418 U.S. 323, 395 (1974).

50. *Id.* at 396.

istics included the requirement by a number of courts that punitive damages bear a reasonable relationship to compensatory damage awards, state retraction laws that allow a retraction to mitigate punitive damages, and the salutary features of the motion for new trial and the appeal to grapple with excessive awards of punitive damages. He concluded his defense of the pre-*Gertz* state law rules on punitive damages by saying: "For almost 200 years, punitive damages and the First Amendment have peacefully coexisted."<sup>51</sup> This last point deserves explication. For most of that 200 years the libel law and the first amendment operated on separate planes; the first amendment did not operate to limit the application of the traditional common-law rules of libel. Today, of course, the first amendment affects libel law, and the role of punitive damages as an equipoise is more important than before.

Past and present history notwithstanding, calls for the prohibition by the Supreme Court of punitive damages on first amendment grounds continue. Libel lawyers Nelson and DeVore assert that the "stage is now set" for the Court "to further restrict or even prohibit the award of punitive damages in the context of a public official/figure libel suit involving issues of public concern."<sup>52</sup>

#### SHOULD THE *Times-Gertz* RULES BE EXCHANGED FOR THE ABOLITION OF PUNITIVE DAMAGES?

It is contended that in these *Times-Gertz* type libel cases the first amendment interest in debate is at its height and the state "interest in providing any recovery beyond compensation for actual provable injury is at its weakest."<sup>53</sup> In short, keep the *Times* rules and scuttle punitive damages. This option is precisely the alternative that should be rejected. A fairer alternative would be to set aside the present *Times-Gertz* rules which work so greatly to the disadvantage of the public plaintiff and in exchange abolish punitive damages.

The real question is—are there any media takers for this offer? I think not. And understandably so. The present *Times-Gertz* rules have very nearly extinguished the libel suit as a meaningful remedy for all but the most well-heeled and indefatigable libel plaintiffs. As a result, more would be lost than gained by accepting this choice. To some extent the present functioning of the actual malice privilege does have some desirable consequences. It encourages vigorous journalism since the actual malice privilege protects most responsible media from the consequences of inadvertent error—error which otherwise might be too easily labeled negligent by juries.

There appears to be no easy exit from the present situation in American libel law. From the point of view of the libel plaintiff—and non-media speakers generally—the actual malice privilege is overly protective of the

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51. *Id.* at 398.

52. *Punitive Damages in Libel Actions*, *supra* note 46, at 35.

53. *Id.*



media defendant. From the perspective of the media defendant, punitive damages are too random and powerful a remedy.

Presently, there is a concerted effort to add punitive damages to the rubble heap of state law libel remedies that have been tossed aside in the name of *Sullivan* and *Gertz*. Yet the imbalance in our communications process will only be exacerbated if the present *Times-Gertz* rules with their gross unfairness to the public person plaintiff are retained but punitive damages are abolished. Too often abolition of punitive damages in libel actions is discussed in isolation, without consideration of the impact that removal of punitive damages would have on the fragile remnant of the libel law now available to a beleaguered libel plaintiff bent on defending his reputation.

The constitutionalization of the libel law has resulted in a legal obstacle course for the libel plaintiff. These obstacles affect not only the public official libel plaintiff but public figures as well. Illustrative is *Anderson v. Liberty Lobby, Inc.*,<sup>54</sup> decided in the same year as *Dun & Bradstreet*. In *Anderson* the Supreme Court held that in a *New York Times* libel case the judge in the summary judgment proceeding should consider whether the reasonable fact-finder could conclude that the plaintiff had shown actual malice with "convincing clarity."<sup>55</sup> The plaintiff in *Anderson* was a public figure, and interestingly enough, Justice White wrote the opinion for the Court.

The ravaging effect of the *Times-Gertz* libel rules on state law has, of course, spread far beyond situations involving the public plaintiff. In *Philadelphia Newspapers, Inc. v. Hepps*,<sup>56</sup> the Court struck down the application of a Pennsylvania statute which followed the common-law rule and placed the burden of proving falsity in a defamation case on the defendant. In *Hepps*, a private plaintiff sought damages for defamation against a media defendant in a matter of public concern. In such circumstances, the first amendment required that the burden of proving falsity should be on the plaintiff.

In *Hepps* Justice O'Connor accurately spoke about two forces that were "reshap[ing] the common-law landscape to conform to the First Amendment."<sup>57</sup> These two forces were centered around whether the plaintiff was a public person and whether the speech at issue was a matter of public concern. The first amendment impact on the common-law landscape was more invasive in the former case than the latter, but it cut a wide swath in the latter area as well. In dissent, Justice Stevens forcefully protested the result in *Hepps*: "By attaching no weight to the State's interest in protecting the private individual's good name, the Court has reached a pernicious result."<sup>58</sup> He then quoted from Justice Stewart's concurrence in *Rosenblatt*

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54. 477 U.S. 242 (1986).

55. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

56. 475 U.S. 767 (1986).

57. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).

58. *Id.* at 781.

*v. Baer*:<sup>59</sup> “ ‘The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. . . . Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.’ ”<sup>60</sup>

The foregoing remarks of Justice Stewart were uttered nearly a quarter of a century ago. Since that time, as we have seen, the common-law libel landscape has been transformed in the name of the first amendment. It is perhaps more difficult now for a libel judgment in favor of the plaintiff to survive appellate review than it has ever been in American history. Is it any wonder in such circumstances that the latitude that punitive damages theoretically afford the libel plaintiff is resorted to more dramatically than in the past?

### CONCLUSION

The argument that the first amendment itself should be read to prohibit punitive damages is certainly not a new one. Yet the issue has often evaded judicial scrutiny in precisely the situations where one would most often expect to find it. Thus in *Brown & Williamson*<sup>61</sup> the court considered and rejected an eighth amendment challenge to the punitive damages award: “Even if we were to accept the defendants’ argument that the excessive fines clause applies to civil proceedings, we conclude that the punitive damages award in this case is not excessive.”<sup>62</sup> The Court did not consider, however, or discuss whether a \$2,000,000 punitive damage award raised or implicated any first amendment issues. *Brown & Williamson* upheld on appeal a total damage award of \$3,050,000: \$2,000,000 in punitive damages against CBS, \$1,000,000 in presumed damages against CBS, and \$50,000 against the reporter.

The concept of proportionality is very much in evidence in the controversy about how our law should treat punitive damages in *Times*-type libel cases. Usually, proportionality means that the punitive damages awarded should be approximately proportional to the compensatory damages awarded. *Brown & Williamson* did not discuss proportionality; the case used a two-pronged inquiry to determine if the punitive damages were excessive: (1) Were the punitive damages excessive in relation to the attorney’s fees incurred by the plaintiff? (2) What relation did the punitive damages bear to the defendants’ wealth?

Judge Bauer answered these questions as follows:

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59. 383 U.S. 75 (1966).

60. *Rosenblatt v. Baer*, 383 U.S. 75, 92-94 (1966), quoted in *Philadelphia Newspapers, Inc.*, 475 U.S. 767, 781-82 (1986).

61. 827 F.2d 1119 (7th Cir. 1987), cert. denied, 108 S. Ct. 1302 (1988).

62. *Brown & Williamson Tobacco Corp. v. CBS, Inc.*, 827 F.2d 1119, 1143 n.13 (7th Cir. 1987), cert. denied, 108 S. Ct. 1302 (1988).

Brown & Williamson's attorney's fees were \$1,360,000 prior to post-trial motions. Jacobson's net worth including his contract with CBS was over \$5,000,000, while CBS's net worth was approximately one and one-half billion dollars. The punitive damages award of \$50,000 against Jacobson is a modest one considering his net worth. It might provide some deterrent value without being destructive. In light of the attorney's fees that Brown & Williamson incurred and CBS's substantial net worth, the \$2,000,000 award against CBS is reasonable. The award might provide some deterrence to future misconduct and yet will not burden CBS with a debt that it cannot easily discharge.<sup>63</sup>

Showing the total wealth of a company like CBS to be one and one-half billion dollars clarifies the role of punitive damages in contemporary libel law. An ordinary individual no less defamed than was Brown & Williamson Tobacco Corporation does not have the \$1,360,000 paid by that company in attorney's fees. Instead of pursuing the defamation action, which abstractly is their right, such individuals simply cannot afford to pursue their rights. Simply put, the availability of punitive damages may make it economically feasible for there to be an occasional plaintiff's bar in the libel field. The libel plaintiff who must cope with the ability of the media defendant to use the discovery process as expensively as possible may find in punitive damages a means of coping with the costs and attorney's fees in libel litigation. The availability of punitive damages may enable a lawyer to take a plaintiff's case on a contingency fee basis. Punitive damages thus become a form of empowerment for those who believe themselves to be both defamed and yet powerless to secure redress. The punitive damages remedy provides an opportunity—momentary in most cases—for the individual plaintiff to transform himself from David to Goliath.

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63. *Id.* at 1143.