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THE ROLE OF THE COURT AND JURY IN LIBEL CASES

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I. INTRODUCTION

There are two uniquely American freedoms: the right to trial by jury and the right of free speech and press. No other country gives its citizens these rights in the expansive way a citizen can enjoy them in our justice system. These two individual liberties most often intersect in defamation cases tried by a jury. When these two rights collide, we see another extraordinary American response. The jury is allowed to vindicate free speech and press rights in a libel case, but when the verdict is for the plaintiff, judges are constitutionally compelled to step in, independently review the evidence and, if it is found wanting, vacate the jury verdict so that wide open and robust debate will not be imperiled or chilled.[1]

Until *New York Times Co. v. Sullivan*, the jury was seen as the champion of free speech and the defender of the First Amendment.[2]

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1. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 (1984); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964).

2. *See Sullivan*, 376 U.S. at 263, 269.

In our early history, juries were thought to be the salvation of free speech and press.[3] During the 1735 trial of John Peter Zenger, a jury nullified the libel instruction provided by the court and exonerated a publisher who had criticized the Royal Governor of New York.[4]

Sullivan brought on a new era where courts began utilizing independent appellate review in order to protect speakers from harsh jury awards. This was thought to be necessary because juries had begun to punish unpopular opinions, as in *Sullivan*, and later the press because of its perceived arrogance.[5] By 1996, separate juries in Texas, Florida, and North Carolina—all within a few months of each other—had awarded over fifteen million dollars in damages against the ABC network,[6] even though, as a juror in the Texas case said, "I couldn't find anything false in [the story]."[7]

Since 1980, the press has failed before juries in libel, slander, and related cases at least sixty-seven percent of the time.[8] This is perhaps because, as public opinion polls show, there is little respect among the populace for free speech and press, and little regard for the institutional media.[9] Juries will continue to protect free speech and press rights in specific cases, but when they do not, our system of de novo appellate review provides a necessary and constitutionally compelled check on juries who reach the wrong result for the wrong reasons.

II. FREE SPEECH AND JURIES

There are at least two principles that distinguish jurisprudence in the United States from other systems of jurisprudence. First, is our profound national commitment to free speech. In 1927, Justice Brandeis wrote of this principle:

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3. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994).

4. *Id.* at 873.

5. *See Sullivan*, 376 U.S. at 256.

6. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999); Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1238 (11th Cir. 1999); Dolcefino v. Turner, 987 S.W.2d 100, 109 (Tex. App.—Houston [14th Dist.] 1998), *aff'd sub nom.*, Turner v. KTRK Television, Inc., 38 S.W.3d 103, 125 (Tex. 2000).

7. *Dateline: Absence of Malice?* (NBC Television broadcast Dec. 29, 1998) (interviewing Juror #2 in *Turner v. KTRK Television, Inc.*).

8. Media Law Res. Ctr., *MLRC 2005 Report on Trials and Damages*, 2005 MLRC BULL. NO. 1, 23 (Feb. 2005), http://www.medialaw.org (last visited Nov. 7, 2005).

9. *See* FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT 2005 FINAL ANNOTATED SURVEY 1–13 (2005), http://www.firstamendmentcenter.org/PDF/SOFA.05.final.web.6.27.PDF (last visited Nov. 7, 2005).

> Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . They recognized the risks to which all human institutions are subject. But they knew . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[10]

The second is our constitutional right to a jury in civil and criminal cases.[11] These two unique and important principles—free speech and the right to a jury—most often intersect in libel cases, and therein lays a potential tension. Juries can serve as a check on censorship by libel,[12] turning back efforts by government officials to punish speech. But juries can just as easily reflect majority sentiment ("governing majorities")[13] in the community and punish unpopular thoughts published by the press or even punish the press because of its perceived or real arrogance and power. Indeed, it was this very concern that prompted the United States Supreme Court, in a case where a southern jury had found The New York Times liable for defaming a local public official, to require independent appellate review of actual malice evidence.[14]

The jury's role in civil and criminal libel cases was initially very limited in both England and the American Colonies.[15] Gradually, the jury received expanded duties in both countries to the point where, in many state constitutions, jurors were expressly empowered to decide both the facts and the law under direction from the court.[16] But in

10. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).
11. U.S. CONST. amends. VI–VII.
12. *See* Alschuler & Deiss, *supra* note 3, at 873.
13. *See, e.g.*, *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).
14. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964).
15. *See* THE LAW REFORM COMM'N, CONSULTATION PAPER ON THE CRIME OF LIBEL 10–11 (Aug. 1991), *available at* http://www.lawreform.ie/publications/data/volume10/lrc_65.html (last visited Nov. 7, 2005).
16. *See* ALA. CONST. art. I, § 13; COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 6; DEL. CONST. art. I, § 5; KY. CONST. § 9; ME. CONST. art. I, § 4; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; N.J. CONST. art. I, § 6; N.Y. CONST. art. I, § 8; N.D. CONST. art. I, § 4; PA. CONST. art. I, § 7; S.C. CONST. art. I, § 16; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; UTAH CONST. art. I, § 15; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20.

1964, the role of juries in certain types of libel cases was sharply curtailed with the decision in *New York Times Co. v. Sullivan*.[17] In *Sullivan*, the Court held that a "public official" could only recover for libel if he or she proved that the statement at issue was published with "actual malice."[18] Any such finding by the jury was to be reviewed de novo on appeal.[19] How did this reversal of fortune come to be, and is it a good thing?

III. LIBEL IN ITS EARLY FORM

In England, libel, in its earliest form, was known as *scandulum magnatum* (slander of big shots) and first found its statutory form in 1275 during the reign of Edward I.[20] The statute provided:

> [None] be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; and he that doth so shall be taken and kept in prison until he had brought him into court which was the first author of the tale.[21]

In essence, it was a crime to criticize the crown. The elements of this crime required it to be an (1) intentional (2) publication (3) of a writing (4) criticizing the government (i.e., its officers, laws, conduct and policies).[22] Truth was not a defense.[23]

Civil actions for libel were first reported during the reign of Edward III (1327–1377) and primarily concerned spoken defamation (slander).[24] During this period in England, it was considered a point of honor to assert and avenge one's good name and personal rights by the sword. In many instances, chivalry superseded the law.[25] Civil actions for defamation (written and spoken) developed, in part, as a

17. *Sullivan*, 376 U.S. at 267 (requiring a showing of actual malice for punitive damages).

18. *Id.* at 279–80.

19. *Id.* at 285.

20. THE LAW REFORM COMM'N, *supra* note 15, at 4.

21. *Id.* (alteration in original) (quoting Statute of Westminster I, 3 Edw. 1, c. 34 (1275)).

22. R.H. HELMHOLZ & THOMAS A. GREEN, JURIES, LIBEL, & JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH- AND EIGHTEENTH-CENTURY TRIALS FOR LIBEL AND SLANDER 40 (1984).

23. *Id.* at 41.

24. FRANCIS LUDLOW HOLT, ESQ., THE LAW OF LIBEL: IN WHICH IS CONTAINED A GENERAL HISTORY OF THIS LAW IN THE ANCIENT CODES, AND OF ITS INTRODUCTION, AND SUCCESSIVE ALTERATIONS, IN THE LAW OF ENGLAND 34 (New York, Stephen Gould 1818).

25. *Id.*

way to limit dueling.[26] Lawsuits eventually came to replace sword fights, dueling, and outright brawls as the preferred method of vindicating one's honor and reputation.

The development of the printing press brought an increase in the claims of written defamation and with it, the development of libel.[27] By the sixteenth century, the common law action for civil libel was firmly established.[28] The gist of the action was damage to the victim of the libel.[29]

The jury had an extremely limited role in criminal libel cases.[30] It was to determine whether the accused published the statement.[31] The question of law of whether the statement was libelous, was left to the judges.[32]

The *Trial of the Seven Bishops* set the stage for the expansion of the role of juries in criminal libel cases.[33] In 1688, James II, a convert to Roman Catholicism during his youth, issued an order requiring that his Declaration of Indulgences be read in all of the churches throughout England.[34] The declaration amounted to an announcement that "it was the king's pleasure, by the exercise of his royal prerogative, to dispense with the penal laws and acts of uniformity, leaving every man free to worship God according to his own conscience."[35] The King's motives were regarded with suspicion because he was not a member of the Church of England.[36] William Sancroft, the Archbishop of Canterbury, called a meeting with Thomas Ken, Bishop of Bath and Wells; John Lake, Bishop of Chichester; Jonathan Trelawny, Bishop of Bristol; William Lloyd, Bishop of St. Asaph; Francis Turner, Bishop of Ely; and Thomas White, Bishop of Peterborough to discuss how to deal with the King's

26. Scott C. Herlihy, Comment, Masson v. New Yorker Magazine: *Actual Malice and Direct Quotations—The Constitutional Right to Lie*, 65 NOTRE DAME L. REV. 564, 566 n.19 (1990).

27. Dave Kluft, Note, *Beyond Words: The Potential Expansion of Defamation by Conduct in Massachusetts*, 83 B.U. L. REV. 619, 622 (2003).

28. THE LAW REFORM COMM'N, *supra* note 15, at 4–5.

29. *Id.* at 5.

30. *Id.* at 11.

31. *Id.*

32. *Id.*

33. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1051 (1993).

34. AGNES STRICKLAND, THE LIVES OF THE SEVEN BISHOPS COMMITTED TO THE TOWER IN 1688 (London, Bell & Daldy 1866), *available at* http://anglicanhistory.org/nonjurors/strickland/sancroft3.html (last visited Nov. 7, 2005).

35. *Id.*

36. *Id.*

order.[37] The bishops agreed to petition the King,

> "praying to be excused from reading or distributing his late declaration for Liberty of Conscience," stating "that their objections proceeded neither from want of duty or affection to his service, but from motives of conscience, because [the declaration] was founded on a dispensing power which had been declared illegal by parliament."[38]

Not surprisingly, James II was not pleased with the Bishops' response to his order and they were promptly charged with libel.[39] During the trial, there was much debate among the judges as to whether the petition was in fact libelous.[40] Although the jury was to decide only the issue of publication, it returned a general verdict of not guilty.[41] The *Seven Bishops* case became precedent for jury nullification of the law[42] and directly led to the Glorious Revolution of 1688, the King's abdication, and the ascension of William III and Mary II to the throne.[43]

IV. INCREASED ROLE OF THE JURY IN ENGLISH LIBEL CASES

The increased role of the jury in libel actions became the law of England with the passage of the Fox Libel Act of 1792.[44] As demonstrated by the *Seven Bishops* case, prior to the Act, the element of publication was the only fact question for the jury; whether the statement was libelous was a question of law for the court.[45] The Act gave juries the power to give a general verdict of guilty or not guilty "upon the whole matter put in issue," meaning the jury could determine both the fact of publication and whether the statements were libelous.[46]

As a necessary corollary of returning a general verdict, the jury would thereafter have the right to apply the law regarding criminal intent and seditiousness.[47] The Fox Libel Act pertained to criminal libel; however, the rules regarding the role of judge and jury in civil

37. *Id.*
38. *Id.* (quoting the bishops' petition to James II).
39. *Id.*
40. The Trial of the Seven Bishops, 12 Howell's State Trials 183, 426–29 (K.B. 1688).
41. *Id.* at 430.
42. HELMHOLZ & GREEN, *supra* note 22, at 42.
43. *Id.* at 41.
44. Libel Act of 1792, 32 Geo. 3, c. 60, § 1 (Eng.), *reprinted in* 24 HALSBURY'S STATUTES OF ENGLAND & WALES 7 (4th ed. reissue 2003).
45. *Id.* at 7, § 1 notes.
46. *Id.* at 7, § 1.
47. HELMHOLZ & GREEN, *supra* note 22, at 45.

and criminal proceedings eventually became one and the same.[48]

In England, this increased role of the jury remains. Libel is one of a limited number of civil actions (libel, deceit, slander, malicious prosecution, and false imprisonment) where citizens have a statutory right to jury trials.[49]

V. JURORS AS PROTECTORS OF FREE SPEECH IN THE UNITED STATES

In the United States, the role of juries in libel cases was shaped by the case of John Peter Zenger.[50] In 1731, William Cosby traveled from England to New York to become the colony's new governor.[51] He was regarded as a rogue governor and reports described him as a spiteful, greedy, and haughty man.[52] Cosby engendered almost immediate opposition.[53]

James Alexander, one of the many colonists who opposed Cosby, decided to publish an independent political newspaper, the New York Weekly Journal, for the purpose of exposing Cosby's misdeeds.[54] Alexander asked John Peter Zenger, one of only two publishers in the colony, to publish the New York Weekly Journal.[55] Although Zenger had primarily printed religious tracts, he agreed.[56] On November 5, 1733, the first issue of the New York Weekly Journal, criticizing Cosby, was published.[57]

Cosby eventually became tired of the New York Weekly Journal's attacks.[58] In January 1734, he tried to shut down the paper.[59]

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48. In 1882, Lord Blackburn in *Capital & Counties Bank, Ltd. v. George Henty & Sons*, specifically stated that "it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel." 7 App. Cas. 741, 775 (H.L. 1882) (appeal taken from C.P.D.).

49. County Courts Act of 1984, c. 28, § 66, *reprinted in* 11 HALSBURY'S STATUTES OF ENGLAND & WALES 741 (4th ed. reissue 2000); Supreme Court Act of 1981, c. 54, § 69, *reprinted in* 11 HALSBURY'S STATUTES OF ENGLAND & WALES 1107 (4th ed. reissue 2000).

50. Douglas Linder, *Famous Trials: The Trial of John Peter Zenger* (Aug. 2001), http://jurist.law.pitt.edu/trials20.htm (last visited Nov. 7, 2005).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

When that effort failed, Cosby had Zenger arrested and charged with libel.[60] Zenger was arrested on November 17, 1734, and was forced to remain in prison until his trial began on July 29, 1735.[61] Andrew Hamilton, one of the most prominent and eloquent attorneys of that time, traveled from Philadelphia to defend Zenger.[62]

In a move shocking to everyone in the courtroom, Hamilton argued that Zenger had indeed published the alleged writings.[63] However, he continued, "the words themselves must be libelous, that is, *false, scandalous, and seditious* or else we are not guilty."[64] Hamilton also argued that if innuendo is all that was needed for libel, almost anything that a man writes may be construed as a libel.[65] Cosby's counsel argued that this position went against the common view of the law of libel in which the jury decided only whether a defendant published the alleged libel. That is because

> the law had taken so great care of men's reputations that if one maliciously repeats [a libel], or sings it in the presence of another, or delivers the libel or a copy of it over to scandalize the party, he is to be punished as a publisher of a libel.[66]

Hamilton responded that the jury had

> the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court *whether the words are libelous or not* in effect renders juries useless (to say no worse) in many cases . . . .[67]

For the first time in American jurisprudence, Hamilton, with those words, informed a jury on their option of "jury nullification."[68] Until Hamilton's argument, the jury believed that its only option was to determine whether the defendant had published the statement. The judge was left to decide whether the statement was libelous.[69] This,

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER PRINTER OF THE NEW YORK WEEKLY JOURNAL 62 (Stanley Nider Katz ed., The Belknap Press of Harvard Univ. Press 1963).
65. *See id.* at 65.
66. *Id.* at 63–64.
67. *Id.* at 78.
68. Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 WHITTIER L. REV. 17, 44 (1992).
69. *See* Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 795–96 (1989).

after all, had been the common practice in libel cases since 1275.[70] Hamilton artfully provided the jury with information on their right to fairly judge an alleged crime by determining the law and the facts.[71] Hamilton told the jury that, if they decided that there was no falsehood in Zenger's statement, they had the right to say so.[72]

In closing, Hamilton argued:

> And has it not often been seen (and I hope it will always be seen) that when the representatives of a free people are by just representations or remonstrances made sensible of the sufferings of their fellow subjects by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by His Majesty he was appointed, and by the law he is bound to protect and encourage. But I pray it may be considered of what use is this mighty privilege if every man that suffers must be silent? And if a man must be taken up as a libeler for telling his sufferings to his neighbour? . . . No, it is natural, it is a privilege, I will go farther, it is a right which all freemen claim, and are entitled to complain when they are hurt; they have a right publicly to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.[73]

The jury returned a general verdict of not guilty.[74] Hamilton was successful in characterizing Zenger's trial as an affront on the colonists' right to speak out against tyrannical governments and abuses of power. In finding for Zenger, the jurors took a stand on the value they placed on liberty and on freedom of speech, and demonstrated the extent to which they would go to preserve them. Hamilton skillfully played upon popular community prejudice against the government in the defense of free press and speech.

As we became a united government of states, these sentiments found expression in the individual state constitutions. Twenty state

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70. THE LAW REFORM COMM'N, *supra* note 15, at 4. At that time the action was applicable to both written and spoken defamation. *Id.*

71. ALEXANDER, *supra* note 64, at 91.

72. *Id.* at 96.

73. *Id.* at 80–81.

74. *Id.* at 101.

constitutions provide that "in all indictments for libel, the jury shall have the right to determine the law and facts"—guaranteeing their citizens the right to a jury trial in libel cases.[75]

Throughout the course of U.S. history, more and more situations arose where the jury, as representatives of the community, sided with a popular government or a public official intent on suppressing unpopular speech or punishing an unpopular speaker. One of the most famous situations occurred in the 1960s in the Deep South where an all white, all male jury was asked to judge publications which were critical of the southern way of life and threatened the political order of the day.[76] The very same jury system that had protected Zenger became a threat to publishers such as The New York Times and civil rights leaders arguing for the extension of fundamental civil rights to all people within the United States.

VI. THE CHANGING TIDE

From the founding of the United States, the jury was seen as the protector of free speech. The jury, however, took on a different role in the 1960s.

In the Deep South, the civil rights movement threatened the so-called "southern way of life." The antagonists were the large and elastic class known as the "outside agitators," as personified by The New York Times.[77] The southern majority reviled organizations such as the National Association for the Advancement of Colored People ("NAACP") and the Southern Christian Leadership Conference, which were led by Martin Luther King, Jr., and Ralph Abernathy.

The established political order in the south fought Dr. King, the Rev. Abernathy, and their sympathizers, and sought to silence them with dogs, fire hoses, billy clubs, and libel suits. All of the parties came

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75. ALA. CONST. art. I, § 13; COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 6; DEL. CONST. art. I, § 5; KY. CONST. § 9; ME. CONST. art. I, § 4; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; N.J. CONST. art. I, § 6; N.Y. CONST. art. I, § 8; N.D. CONST. art. I, § 4; PA. CONST. art. I, § 7; S.C. CONST. art. I, § 16; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; UTAH CONST. art. I, § 15; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20. Although use of the word "indictments" connotes a criminal trial, these provisions are viewed as justification for jury trials in civil libel actions. As discussed above, the rules for civil and criminal libel cases began to overlap and merge as the law of libel emerged over time. Moreover, the criminal libel statutes of at least seven states have been struck down as unconstitutional. *See* Jeffrey Hunt & David Reymann, *Criminal Libel Law in the U.S.*, *in* 2002 LDRC BULL. NO. 2 79, 88–90 (Mar. 27, 2002), *available at* http://www.medialaw.org/ (last visited Nov. 7, 2005).

76. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

77. *Id.* at 294 (Black, J., concurring).

together in a remarkable lawsuit after The New York Times published an editorial advertisement entitled "Heed Their Rising Voices," which was sponsored by the NAACP and signed by Abernathy.[78] The advertisement ran on March 29, 1960, and stated in part:

> As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .[79]

The advertisement went on to describe incidents in the "wave of terror,"[80] including expulsion of protestors from schools, truckloads of police officers armed with shotguns and teargas surrounding the Alabama State College Campus, the campus dining hall padlocked when the student body protested, the bombing of Dr. King's home in which his wife and children were almost killed, and the numerous false arrests of Dr. King in an attempt to intimidate him.[81]

L.B. Sullivan, the Commissioner of Public Affairs for Montgomery, Alabama, brought a civil suit against The New York Times,[82] alleging that he had been libeled by the statements in the advertisement.[83] Although Sullivan was not mentioned by name, he contended that the allegations that the police circled the campus implied a reference to him since his duties as Public Affairs Commissioner included supervision of the Police Department.[84] He also claimed that the padlocking of the student dining hall, as well as the alleged false arrests of Dr. King, could be imputed to the police and hence to him, since the police are generally responsible for such actions.[85] According to Sullivan, since the police were implicated in the other acts of terror mentioned in the advertisement, the statements regarding the bombing of Dr. King's home could also be read as accusing the police and, by extension, to him as the Public Affairs Commissioner.[86]

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78. *Id.* at 256.
79. *Id.* at app.
80. *Id.*
81. *Id.* at 257–58.
82. *Id.* at 256.
83. *Id.*
84. *Id.* at 258.
85. *Id.*
86. *Id.*

A Montgomery County jury awarded Sullivan $500,000 in damages even though he had made no attempt to prove actual damages.[87] Furthermore, the bombing of Dr. King's home and three of his four arrests occurred before Sullivan became Commissioner, so those acts as described in the advertisements could not have been imputed to Sullivan.[88] Nonetheless, the Alabama Supreme Court affirmed the jury award.[89] Libel cases against The New York Times cropped up all over Alabama.[90] By the time *Sullivan* reached the United States Supreme Court, local and state officials in Alabama had filed eleven suits against the newspaper seeking $5.6 million in damages.[91] Without libel insurance, the numerous suits and potentially high jury awards threatened the paper's very existence.[92]

Sullivan was appealed to the Supreme Court, where Justice Brennan's decision fundamentally changed the law of libel.[93] Not only was a common law tort subjected to constitutional limitations requiring public officials to prove falsity and actual malice by clear and convincing evidence, but the decision also strongly reflected a distrust of juries by reversing a 700-year trend wherein juries had been perceived as the protector of speech (or at least as neutral) in their adjudication of libel cases.[94]

The United States Supreme Court held that,

> the rule of law applied by the Alabama courts [was] constitutionally deficient for fail[ing] to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.[95]

According to Justice Brennan, the decision by the Alabama

87. *Id.* at 256, 260.
88. *Id.* at 259.
89. *Id.* at 256.
90. *Id.* at 295 (Black, J., concurring).
91. *Id.*
92. *Id.* at 294 (Black, J., concurring).
93. *Id.* at 254, 264, 279–80 (holding that the rule of law applied by the Alabama courts in "a libel action brought by a public official against critics of his official conduct" failed to "provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments," and that the Constitution required a new "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'").
94. *See generally* Frederick Schauer, *The Role Of The People In First Amendment Theory*, 74 CAL. L. REV. 761 (1986) (tracing the role juries have historically played in the adjudication of libel cases).
95. *Sullivan*, 376 U.S. at 264.

courts reflected "'the obsolete doctrine that the governed must not criticize their governors.'"[96] The Court also held that actual malice is a required element in libel actions brought by public figures where the alleged libel concerns their public duties.[97]

The Court considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[98] According to the Court, it had already been established that constitutional protection of free speech did not turn upon "'the truth, popularity, or social utility of the ideas and beliefs which [were] offered.'"[99] Based on the history of suppression of ideas and speech in the past, the forefathers had decided "'in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'"[100] Erroneous statements are inevitable in free debate; however, they too must be protected "if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[101]

Expressions of views critical of local government officials were protected, if at all, by juries during the pre-*Sullivan* era. But juries can easily turn against unpopular speech and this is exactly what happened in *Sullivan*. That the United States Supreme Court stepped in and "constitutionalized" state libel law is as remarkable as it was necessary to protect speech and the press.

VII. COURTS STEP IN TO PROTECT FREE SPEECH

In reaching its decision, the United States Supreme Court in *Sullivan* conducted an independent examination of the whole record to determine whether it could constitutionally support a judgment for the respondent, and to assure itself that the judgment did not constitute a forbidden intrusion into the area of free expression.[102] Sullivan of course argued that the Seventh Amendment precluded the Court from conducting such an examination.[103] The Court reasoned

96. *Id.* at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).
97. *Id.* at 283.
98. *Id.* at 270.
99. *Id.* at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).
100. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).
101. *Id.* at 271–72 (alteration in original) (quoting *Button*, 371 U.S. at 433).
102. *Id.* at 284–85.
103. *Id.* at 285 n.26.

that the Seventh Amendment's provision that "'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law'" was applicable to states appearing before the Court.[104] However, the Seventh Amendment's "'ban on re-examination of facts [did] not preclude [the Court] from determining whether governing rules of federal law [had] been properly applied to the facts.'"[105] The Court held that it would "'review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'"[106]

After *Sullivan*, a widespread trend emerged of jury verdicts being overturned on appeal in order to protect the speaker.[107] More courts also began treading the fine line between the First and Seventh Amendment, conducting independent appellate reviews in libel actions based on the rationale that

> whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."[108]

Courts, following the Supreme Court's lead, held the view that independent appellate reviews were necessary in order to "preserve the precious liberties established and ordained by the Constitution."[109]

In Texas, the appellate court has the opportunity to review the sufficiency of the proof on an interlocutory appeal of denial of summary judgment in cases involving the media.[110] This device has proved remarkably effective for press defendants since it was enacted approximately twelve years ago.[111]

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104. *Id.* (quoting U.S. CONST. amend. VII).
105. *Id.*
106. *Id.* (alteration in original) (quoting Fiske v. Kansas, 274 U.S. 380, 385–86 (1927)); *see also* Haynes v. Washington, 373 U.S. 503, 515–16 (1963).
107. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 489–93, 514 (1984).
108. *Id.* at 511.
109. *Id.* at 510–11.
110. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (Vernon Supp.2004–2005).
111. *See id.* § 51.014 note (Historical and Statutory Notes).

VIII. CURRENT VIEWS ON THE FIRST AMENDMENT

In 2005, the Media Law Resource Center reported on jury verdicts involving libel, privacy, and related claims against media defendants, arising out of their acquisition and publication of information about media cases that went to trial during the last twenty-five years.[112] Since 1980, 506 cases reached a jury verdict.[113] Plaintiffs won 307 (60.7%) of the cases reaching a jury.[114] Trial courts reversed 31 (10.5%) of the 307 cases won by plaintiffs on post-trial motions.[115] Of the 276 jury awards that survived post-trial motions, 132 (47.8%) were reversed or modified on appeal; 64 (23.2%) were affirmed on appeal; 35 (12.7%) were not appealed; 7 (2.5%) had appeals still pending as of February 2005; 30 (10.9%) had post-trial settlements; and the final disposition was unknown in 8 (2.9%).[116] Since 1980, jury awards for plaintiffs in libel cases have been overturned on appeal in approximately 48% of the cases.[117]

Surveys on society's views on the First Amendment show a populace in constant debate over whether freedom should be limited and, if so, to what extent.[118] Public support for the First Amendment is not always stable; rising and falling as times change.[119]

The 2004 State of the First Amendment Survey[120] once again reflected that "[i]n the minds of many Americans, there is a troubling disconnect between principle and practice when it comes to First Amendment rights and values."[121] The results of the survey showed:

- 30% of adults believe that "the First Amendment goes too far in the rights it guarantees."

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112. *See generally* Media Law Res. Ctr., *MLRC 2005 Report on Trials and Damages*, 2005 MLRC BULL. NO. 1 (Feb. 2005), http://www.medialaw.org (last visited Nov. 7, 2005) (reporting on twenty-five years of trials).

113. *Id.* at 21.

114. *Id.* at 2.

115. *Id.* at 57.

116. *Id.* at 2.

117. *Id.* at 61.

118. Gene Policinski, *Commentary on the 2004 report*, June 28, 2004, http://www.firstamendmentcenter.org/commentary.aspx?id=13574 (last visited Nov. 7, 2005).

119. JOHN S. & JAMES L. KNIGHT FOUND. ET AL., FUTURE OF THE FIRST AMENDMENT 1 (2004), http://firstamendment.jideas.org/downloads/future_final.pdf (last visited Nov. 7, 2005).

120. The survey has been conducted by the First Amendment Center on an annual basis since 1997. First Amendment Ctr., State of the First Amendment: Overview, http://www.firstamendmentcenter.org/sofa_reports/index.aspx (last visited Nov. 7, 2005).

121. FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT 2004 7 (2004), http://www.firstamendmentcenter.org/pdf/sofa2004.pdf.

- 42% of adults think the "press in America has too much freedom."
- 36% of adults agree with the statement, "Americans have too much press freedom."
- 56% of adults think that newspapers should be allowed to freely criticize the United States military about its strategy and performance; 41% of adults think that they should not.
- 49% of adults believe that the media has too much freedom to publish whatever it wants; 34% of adults believe that there is too much government censorship.
- 11% of adults "think Americans have too much freedom to speak freely"; 28% of adults think Americans have too little; 60% of adults think we have just enough.
- 54% of adults think "people should be allowed to say things in public that might be offensive to religious groups"; 44% of adults think they should not be allowed to do so.
- 35% of adults think that people should be allowed to say things in public that might be offensive to racial groups; 63% of adults think that they should not.[122]

A recent study of high school students conducted by the John S. and James L. Knight Foundation in collaboration with the University of Connecticut showed:

- "After the text of the First Amendment was read to students, more than a third of them (35 percent) thought that the First Amendment goes too far in the rights it guarantees."
- 83% of students felt that "[p]eople should be allowed to express unpopular opinions."
- 51% of students felt that "[n]ewspapers should be allowed to publish freely without government approval of stories."
- 70% of students felt that "[m]usicians should be allowed to sing songs with lyrics others may find offensive."
- 58% felt that high school "students should be allowed to report controversial issues in their student newspapers [without] approval of school authorities."[123]

These views mirror the opinions of many jurors. "In theory," the jury is a cross-section of the larger community and, "the views of the

122. *Id.* at 9, 12, 15–17, 27–28.
123. JOHN S. & JAMES L. KNIGHT FOUND., *supra* note 119, at 3–4.

jury reflect the views of the population at large" and vice versa.[124] "The jury has always been perceived as a practical surrogate for popular decisionmaking in a world in which it is impossible to put questions of individual liability or culpability to electoral referenda."[125] The size of jury awards during the past twenty-five years are not surprising when viewed in light of the survey results on societal views of the First Amendment and freedom of speech.

IX. CONCLUSION

Libel, as we know it today, has evolved over the last 730 years, starting in 1275 with *scandulum magnatum* and progressing to jury nullification in the *Trial of the Seven Bishops* in 1688, to juries being given the statutory right to determine the law and the facts with the passage of the Fox Libel Act in 1792, to the right to a jury trial in libel actions being granted in state constitutions, to years of juries being seen as the protector of free speech within the United States, and finally to the about-face in the 1960s where juries were no longer seen as the protector of speech, and finally, as one result of *Sullivan*, to an increase in independent appellate review in libel cases so as to guarantee constitutional protection of speech.

Juries in libel cases today are similar to the *Zenger* jury. Today's jury will take a stand against affronts to our ability to speak freely and express opinions. When faced with questions of libel, juries are more likely to protect the speaker when the issue is presented as not only the defendant's right to express his or her opinion, but also as freedom of speech for all people, including the jurors. Even if the jury does not like the speech or it is unpopular speech, jurors tend to vote in favor of the speaker when they realize that cutting off one person's ability to express his or her views also silences them and their neighbors, and stifles other viewpoints that they may support, or at least not find offensive.

The 2004 State of the First Amendment Survey revealed an interesting distinction that many Americans tend to make. When asked whether the "press in America [had] too much freedom," forty-two percent of adults responded affirmatively.[126] But when the question was rephrased as whether "Americans have too much press freedom," only thirty-six percent said yes.[127] Speech of institutions or

124. Schauer, *supra* note 94, at 768.
125. *Id.*
126. FIRST AMENDMENT CTR., *supra* note 121, at 9.
127. *Id.*

entities is not weighed the same in terms of worthiness of protection. Americans are more likely to be supportive of speech if the speaker is depicted in a more human light and not simply as an entity.

The United States approach to jury decisions in libel cases is unique. The courts in the first instance determine whether a case is worthy of going to trial. Juries then have the opportunity to exonerate the speaker, but if they do not, appellate courts are constitutionally compelled to independently examine the record to make sure that unpopular opinions or unpopular institutions are not being penalized without the requisite amount of evidence.