Communications Lawyer
Publication of the Forum on Communications Law
American Bar Association
Volume 23, Number 1, Spring 2005
THE JOURNAL OF MEDIA, INFORMATION, AND COMMUNICATIONS LAW

In this issue

Trial by Jury: Two-Edged Sword?

CHARLES L. BABCOCK

I once had a prospective juror tell me during voir dire that it would take two newspaper witnesses to overcome the testimony of one plaintiff witness in a libel trial. In another case, a woman said she could not be fair because the newspaper defendant had endorsed the candidacy of President Bush. Others have expressed distaste for the media during jury selection in a variety of ways. All of these people were excused from jury service for cause.

Then there are the "media haters" who do not reveal themselves, and quietly, sometimes eagerly, await their selection as jurors in order to, as one recent juror put it after the verdict, "keep the media from getting away with one." This comment came in a case brought by a public official where the *absence* of "actual malice" was overwhelming and there was no evidence approaching the clear and convincing proof that the First Amendment requires. We failed to spot this "media hater," who fortunately did not, ultimately, sway the jury.

On the other hand, we have seen jurors who have a profound respect for free speech and the role that the press plays in our society. One juror expressed the view during voir dire in a libel case between waste disposal companies that "everyone has the right to free speech, even garbage companies." During *The Cattlemen*'s case against Oprah Winfrey, a juror spoke eloquently during deliberations that he had seen many individual rights lost during his lifetime. The only right remaining, he said, was the right to free speech, and this right is the only way to recapture our lost liberties. His comment was influential in driving the jury to a defense verdict.

We have always seen this ambivalence about free speech and press, perhaps best articulated by the passage from Tom Stoppard's *Night and Day*: "I'm all for freedom of the press, it's newspapers I don't like." But in our early history, juries were thought to be the salvation of free speech and press. Indeed, the 1735 trial of John Peter Zenger saw a jury nullify the libel instruction provided by the court and exonerate a publisher who criticized the Royal Governor of New York. By 1996, however, we learned that separate juries in Texas, Florida, and North Carolina—all within a few months of each other—had awarded over $20 million in damages against the ABC network,[1] even though, as a juror in the Texas case said, "I couldn't find anything false in [the story]."[2]

The twin, uniquely American, rights to trial by jury and to free speech and press most often intersect in libel cases. Juries can promote free speech by checking the "chilling effects" of a libel judgment as occurred in the Zenger case. But the jury, just as easily and, of late, frequently reflects the majority sentiment in the community by punishing unpopular speech and sanctioning the press, not for what it says but for what the press itself is perceived to be—rich, powerful, and arrogant. To a large extent, juries no

(Continued on page 26)

Charles L. (Chip) Babcock (cbabcock@jw. com) is a litigation partner at Jackson Walker L.L.P. and a fellow in the American College of Trial Lawyers and the International Academy of Trial Lawyers; he has tried fourteen libel cases to a jury verdict. He was assisted by his colleague Zola Williams at Jackson Walker, who did much of the work for this article.

Trial by Jury

(Continued from page 1)

longer differentiate between "the press" and "the media," which are perceived as motivated solely by higher ratings and more revenue.

What explains the amazing statistic that since 1964 the press has failed before juries in libel, slander, and related cases at least 60 percent of the time? It is perhaps because public opinion polls show such little respect among the populace for free speech and press and little regard for the institutional media. 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 that reach the wrong result for the wrong reasons.

"I'm all for freedom of the press, it's newspapers I don't like."

—*Night and Day* by Tom Stoppard

Collision of Free Speech and Juries

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

> 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.[3]

The second is our constitutional right to a jury in civil and criminal cases. These two unique and important principles—free speech and juries—most often intersect in libel cases, and therein lies a potential tension. Juries can be a check on censorship by libel,[4] turning back efforts by government officials to punish speech. But juries can just as easily reflect majority sentiment ("governing majorities") in the community and punish unpopular thoughts published by the press or indeed punish the press because of its perceived or real arrogance and power. Indeed, it was this very concern that prompted the U.S. 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.[5]

The jury's role in civil and criminal libel cases was initially very limited in both England and the American colonies. 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.[6] But in 1964, the role of juries in certain types of libel cases was sharply curtailed with the decision in *New York Times v. Sullivan.* In that case, the jury was instructed to return a plaintiff's verdict only when the plaintiff, a "public official," had proved by "clear and convincing evidence" that the false and defamatory statement at issue was published with "actual malice." Any such finding by the jury was to be reviewed de novo on appeal. How did this reversal of fortune come to be, and is it a good thing?

Slander of Big Shots

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.[7] The statute provided

> [none] be so hard 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.[8]

In essence, it was a crime to criticize the crown. The elements of this crime were (1) intentional (2) publication (3) of a writing (4) criticizing the government (i.e., its officers, laws, conduct, policies, etc.).[9] Truth was not a defense.[10]

Civil actions for libel were first reported during the reign of Edward III (1327–77) and primarily concerned spoken defamation (slander). 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[11] and civil actions for defamation (written and spoken) developed, in part, as a way to limit dueling. 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 in 1450 brought an increase in the claims of written defamation and with it the development of libel. By the sixteenth century, the common law action for civil libel was firmly established.[12] The gist of the action was damage to the victim of the libel.[13]

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

The Trial of the Seven Bishops set the stage for the expansion of the role of juries in criminal libel cases. 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.[14] 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."[15] The king's motives were regarded with suspicion because he was not a member of the Church of England.[16] 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 order.[17] 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."[18]

Not surprisingly, James II was not pleased with the bishops' response to his order and they were promptly charged with libel. During the trial, there was much debate among the judges as to whether the petition was in fact libelous.[19] Although the jury was to decide only the issue of publication, it returned a general verdict of not guilty.[20] The Seven Bishops case became precedent for jury nullification of the law[21] 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.

Guardians of Free Speech

The increased role of the jury in libel actions became the law of England with the passage of the Fox Libel Act of 1792.[22] 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. The Act gave juries the power to give a general verdict of guilty or not guilty "upon the whole matter put in issue," meaning that the jury could determine both the fact of publication and whether the statements were libelous.[23]

As a necessary corollary of being given the right to return a general verdict, the jury would thereafter have the right to apply the law regarding criminal intent and seditiousness.[24] The Fox Libel Act pertained to criminal libel. However, the rules regarding the role of judge and jury in civil and criminal proceedings eventually became one and the same.[25]

In England, this increased role of the jury survives to this day. Libel is one of a limited number of civil actions where citizens have a statutory right to jury trials.[26] The jury is still thought to be the primary protector of free speech against the assault of a libel case.

Jury Nullification

In the United States, the role of juries in libel cases was shaped by the case of John Peter Zenger. In 1731, William Crosby traveled from England to New York and became the colony's new governor. Regarded as the colony's rogue governor and described as a spiteful, greedy, and haughty man,[27] Crosby engendered almost immediate opposition.

James Alexander, one of the many colonists who opposed Crosby, decided to publish an independent political newspaper, the *New York Weekly Journal*, for the purpose of exposing Crosby's misdeeds.[28] Alexander asked John Peter Zenger, one of only two publishers in the colony, to execute the idea.[29] Although Zenger had primarily printed religious tracts, he agreed.[30] On November 5, 1733, the first issue of the *New York Weekly*, criticizing Crosby, was published.[31]

Crosby eventually became tired of the *New York Weekly*'s attacks. In January 1734, he tried to shut down the paper.[32] When that effort failed, Crosby had Zenger arrested and charged with libel.[33] Zenger was arrested on November 17, 1734, and was forced to remain in prison until his trial began on July 29, 1735.[34] Andrew Hamilton, one of the most prominent and eloquent attorneys of that time, came from Philadelphia to defend Zenger.

In a move shocking to everyone in the courtroom, Hamilton argued that Zenger had indeed published the alleged writings. However, he continued, "the words themselves must be libelous[,] that is false, scandalous, and seditious[,] or else we are not guilty."[35] Hamilton also argued that if innuendo is all that is needed for libel, almost anything that a man writes may be construed as a libel. Crosby's counsel argued that this position went against the common view of the law of libel in which the jury decides only whether a defendant published the alleged libel, 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."

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 libellous or not, in Effect renders Juries useless (to say no worse) in many Cases. . . .[36]

For the first time in American jurisprudence, Hamilton, with those words, informed a jury on its option of "jury nullification." Until Hamilton's argument, the jury believed that its only option was to determine whether the defendant had published the statement and then the judge was left to decide whether the statement was libelous. This, after all, had been the common practice in libel cases since 1275. Hamilton artfully provided the jury with information on its right to fairly judge an alleged crime by determining the law and the facts. Hamilton told the jury that if they decided that there was no falsehood in Zenger's statement, then they had the right to say so.

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 Governour, they have declared (and loudly too) that they were not obliged by any Law to support a Governour 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 Libeller, 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 publickly to remonstrate the Abuses of Power, in the strongest Terms, to put their Neighbours 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.[37]

The jury returned a general verdict of not guilty. 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 that

they placed on liberty and on freedom of speech and 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 constitutions [see sidebar below] provide that ". . . in all indictments for libel, the jury shall have the right to determine the law and the facts. . ."—guaranteeing their citizens the right to a jury trial in libel cases.[38]

But what happens when the jury, as representatives of the community, sides with a popular government or a public official intent on suppressing unpopular speech or punishing an unpopular speaker? The issue arose in the 1960s in the Deep South where all white, all male jurors were asked to judge publications that were critical of the southern way of life and that threatened the political order of the day. The very same jury system that had protected Zenger was now a threat to publishers such as *The New York Times* and those "rising voices" speaking about the need to extend civil rights to everyone.

Preserving Precious Liberties

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," which included the "liberal East Coast press," as personified by *The New York Times*. The southern majority reviled organizations such as the National Association for the Advan-cement of Colored People (NAACP) and the Southern Christian Leadership Conference, the latter of which was 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. The parties came 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.[39] 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 unprecedented waves of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . .[40]

The advertisement went on to describe incidents in the "waves of terror," including expulsion of protestors from schools, truckloads of police officers armed with shotguns and tear gas 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.[41]

L.B. Sullivan, the commissioner of public affairs for Montgomery, Alabama, brought a civil suit against *The New York Times*,[42] alleging that he had been libeled by the statements in the advertisement.[43] 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.[44] 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.[45] 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, the public affairs commissioner.[46]

A Montgomery County jury awarded Sullivan $500,000 in damages, even though he had made no attempt to prove actual damages. 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 advertisement, could not have been imputed to Sullivan.[47] Nevertheless, the jury award was affirmed by the Alabama Supreme Court.[48]

Libel cases against *The New York Times* cropped up all over the South. By the time *Sullivan* reached the U.S. Supreme Court, local and state officials in Alabama had filed eleven suits against the newspaper, seeking $5,600,000 in damages.[49] Without libel insurance, the paper's very existence was threatened by the numerous suits and potentially high jury awards.

Sullivan was appealed to the U.S. Supreme Court, where Justice Brennan's decision fundamentally changed the law of libel. Not only was a common law tort subject to constitutional limitations that require public officials to prove falsity and actual malice by clear and convincing evidence, the decision also strongly reflected a distrust of juries, reversing a 700-year trend wherein juries had been perceived as the protector of speech (or

Libel Trial by Jury

The constitutions of twenty states guarantee the right to trial by jury when libel is involved. The specific provisions are identified below:

Alabama (Art. I, § 12)
Colorado (Art. II, § 10)
Connecticut (Art. I, § 6)
Delaware (Art. I, § 5)
Kentucky (Bill of Rights, § 9)
Maine (Art. I, § 4)
Mississippi (Art. 3, § 13)
Missouri (Art. I, § 8)
Montana (Art. II, § 7)
New Jersey (Art. I, § 6)
New York (Art. I, § 8)
North Dakota (Art. I, § 4)
Pennsylvania (Art. I, § 7)
South Carolina (Art. I, § 16)
South Dakota (Art. VI, § 5)
Tennessee (Art. I, § 19)
Texas (Art. I, § 8)
Utah (Art. I, § 15)
Wisconsin (Art. I, § 3)
Wyoming (Art. I, § 20)

at least as neutral) in their adjudication of libel cases.

The U.S. Supreme Court held that the rule of law, as applied by the Alabama courts, was constitutionally deficient for failing 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.[50] According to Justice Brennan, the decision by the Alabama courts reflected "the obsolete doctrine that the governed must not criticize their governors."[51] 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.[52]

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."[53] 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."[54] Based on the history of suppression of ideas and speech in the past, the forefathers had decided that "in spite of the 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."[55] Erroneous statements are inevitable in free debate; however, they too must be protected "if the freedoms of expression are to have the breathing space they need to survive."[56]

Expression of views critical of local government officials was 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 U.S. Supreme Court stepped in and "constitutionalized" state libel law is as remarkable as it was necessary to protect speech and the press.

After *Sullivan,* a widespread trend emerged of jury verdicts being overturned on appeal in order to protect the speaker. In Texas, the appellate court has the opportunity to review the sufficiency of the proof on an interlocutory appeal of denial of summary judgment. This device has proved remarkably effective for press defendants since it was enacted approximately eight years ago.

More courts also began treading the fine line between the First and Seventh Amendments, conducting independent appellate reviews in libel actions based on the rationale that

> [w]hether 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."[57]

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."[58]

First Amendment Survey Presents Troubling Disconnect

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, that went to trial during the last twenty-five years.[59] Since 1980, 506 cases reached a jury verdict. Plaintiffs won 307 (60.7 percent) of the cases reaching a jury.[60] Trial courts reversed thirty-one (10.1 percent) of the 307 cases won by plaintiffs on post-trial motions.[61] Of the 276 jury awards that survived post-trial motions, 132 (47.8 percent) were reversed or modified on appeal; sixty-four (23.2 percent) were affirmed on appeal; thirty-five (12.7 percent) were not appealed; seven (2.5 percent) had appeals still pending as of February 2005; thirty (10.9 percent) had post-trial settlements; and final disposition was unknown in eight (2.9 percent).[62] Since 1964, jury awards for plaintiffs in libel cases have been overturned on appeal in 80 percent of the cases.

Surveys on society's views on the First Amendment show a populace in constant debate over whether freedom should be limited and, if so, what kinds of restrictions should be permitted.[63] Public support for the First Amendment is not always stable.[64]

The 2004 State of the First Amendment Survey[65] once again reflected that: "*In the minds of many Americans, there is a troubling disconnect between principle and practice when it comes to First Amendment Rights and Values.*"[66] The results of the survey showed:

- 30 percent of adults believe that the First Amendment goes too far in the rights that it guarantees.
- 42 percent of adults think the press in America has too much freedom.
- 36 percent of adults agree with the statement that Americans have too much press freedom.
- 56 percent of adults think that newspapers should be allowed to freely criticize the U.S. military about its strategy and performance; 41 percent of adults think that they should not.
- 49 percent of adults believe that the media has too much freedom to publish whatever it wants; 34 percent of adults believe that there is too much government censorship.
- 11 percent of adults think Americans have too much freedom to speak freely; 28 percent of adults think Americans have too little; 60 percent of adults think we have just enough.
- 54 percent of adults think people should be allowed to say things in public that might be offensive to religious groups; 44 percent of adults think they should not be allowed to do so.
- 35 percent of adults think that people should be allowed to say things in public that might be offensive to racial groups; 63 percent of adults think that they should not.[67]

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, 35 percent thought that the First Amendment went

too far in the rights it guarantees.

- 83 percent of students felt that people should be allowed to express unpopular opinions.
- 51 percent of students felt that newspapers should be allowed to publish freely without government approval of stories.
- 78 percent of students felt that musicians should be allowed to sing songs with lyrics that others may find offensive.
- 58 percent of students felt that high school students should be allowed to report controversial issues in their student newspapers without approval of school authorities.[68]

These views mirror the opinions of many jurors. The jury is a cross-section of the larger community and, in theory, the views of the jury reflect the views of the population at large and vice versa.[69] The jury has always been seen as a practical surrogate for popular decision making in a world in which it is impossible to put questions of individual liability or culpability to electoral referenda.[70] The size of jury awards during the past twenty-five years is not surprising when viewed in light of the survey results on societal views of the First Amendment and freedom of speech.

The Metamorphisis of Libel

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. One result of *New York Times Co.* has been 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," 42 percent of adults responded affirmatively. But when the question was rephrased as whether "Americans have too much press freedom," only 36 percent said "yes." Speech of institutions or 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 approach to jury decisions in libel cases is unique in the United States. 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.

Endnotes

1. Food Lion v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (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. 1998).
2. NBC News Transcripts, *Dateline NBC*, Dec. 29, 1998, *Absence of Malice?* (court case involving Sylvester Turner, a candidate in the Texas 1991 mayoral race; Wayne Dolcefino, a local Channel 13 reporter, finds the TV station at fault for reckless reporting).
3. Whitney v. California, 274 U.S. 357, 375–76 (1927).
4. New York Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964).
5. *Id.* at 285–86.
6. *See infra* note 38.
7. The Law Reform Commission (Dublin, Ireland), *Consultation Paper on the Crime of Libel* (1991), *at* http://www.lawreform.ie/publications/data/volume10/lrc_65.html.
8. *Id.* at 3.
9. The elements of criminal libel are derived from case law as set out in Thomas Green, *The Jury, Seditious Libel, and the Criminal Law in* JURIES, LIBEL AND JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH AND EIGHTEENTH CENTURY TRIAL FOR LIBEL AND SLANDER 40 [Papers Read at a Clark Library Seminar, 28 February 1981] (Los Angeles, 1984).
10. Trial of the Seven Bishops, 12 How. St. Tr. 183, 415 (1688), *at* http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys6.html.
11. 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 COMPREHENDING A DIGEST OF ALL THE LEADING CASES UPON LIBELS, FROM THE EARLIEST TO THE PRESENT TIME 34 (1818).
12. *Consultation Paper on Libel*, *supra* note 7, at 3. At that time the action was applicable to both written and spoken defamation.
13. *Id.* at 3–4.
14. Green, *supra* note 9, at 41–42; AGNES STRICKLAND, THE LIVES OF THE SEVEN BISHOPS, COMMITTED TO THE TOWER IN 1688 (1866), *available at* http://justus.anglican.org/resources/pc/nonjurors/strickland/sancroft3.html (visited Apr. 22, 2004).
15. STRICKLAND, *supra* note 14.
16. *Id.*
17. *Id.*
18. *Id.*
19. Trial of the Seven Bishops, 12 How. St. Tr. 183, 415 (1688), *at* http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys6.html.
20. *Id.*
21. Green, supra note 9, at 42.
22. The passage of the Act was spearheaded by Charles James Fox.
23. Halsbury's Statutes of England and Wales, Fox Libel Act of 1792, Footnotes (4th ed. 2003).
24. Green, *supra* note 9, at 45.
25. In 1882, Lord Blackburn in the *Capital and Counties Bank, Ltd. v. George Henty & Sons*, 7 App Cas 741, 775 (1882), 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."
26. Bella Louise Morris, *Jury Trials In Personal Injury Claims—Is There A Place For Them*, J.P.I. LAW 2002, 3, 310–15, 311;

County Courts Act 1984 § 66; Supreme Court Act 1981 § 69. The other civil actions in which English citizens have a right to jury trial are deceit, slander, malicious prosecution, and false imprisonment.

27. Douglas Linder, *The Trial of John Peter Zenger* (August 2001), *at* http://jurist.law.pitt.edu/trials20.htm.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. John Peter Zenger, *A Brief Narrative of the Case and Tryal of John Peter Zenger, Printer of the New York Weekly Journal* (1735) (Historical Society of the State of New York), *available at* www.courts.state. ny.us/history/elecbook/zenger_tryal/pg1.htm (visited Mar. 31, 2005).

36. *Id.* at 19–20.

37. *Id.*

38. 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* MLRC BULL. No. 4 (2004); MLRC BULL. No. 2 (2002).

39. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

40. *Id.* at 305.

41. *Id.*

42. *Id.* at 256.

43. *Id.*

44. *Id.* at 258.

45. *Id.*

46. *Id.*

47. *Id.* at 256–59.

48. *Id.* at 256.

49. *Id.* at 295 (Black, J. concurring).

50. *Id.* at 264.

51. *Id.* at 272.

52. *Id.* at 283.

53. *Id.* at 270.

54. *Id.* at 271.

55. *Id.*

56. *Id.* at 271–72.

57. Bose Corp. v. Consumers Union, 466 U.S. 485, 511 (1984).

58. *Id.* at 510–11.

59. MEDIA LAW RESOURCE CENTER, MLRC 2005 REPORT ON TRIALS AND DAMAGES (Feb. 2005), *available at* http://www.medialaw.org.

60. *Id.*

61. *Id.*

62. *Id.*

63. Gene Policinski, *Commentary on the 2004 Report,* First Amendment Center, June 28, 2004, *at* http://www.firstamendmentcenter.org/commentary (visited Apr. 5, 2005).

64. *Future of the First Amendment, Executive Summary, at* http://firstamendment.jideas.org/findings/findings.php (visited Apr. 5, 2005).

65. The survey has been conducted by the First Amendment Center on an annual basis since 1996.

66. Paul McMasters, Analysis*: 2004 State of the First Amendment Survey Report,* First Amendment Center, June 28, 2004, *at* http://www.firstamendmentcenter.org/analysis (visited Apr. 5, 2005). This theme has been consistent throughout each survey over the last eight years.

67. *State of the First Amendment 2004 Survey, Final Annotated Survey,* First Amendment Center, June 28, 2004, *at* http://www.firstamendmentcenter.org/sofa_reports/index.aspx (visited Apr. 5, 2005).

68. John S. and James L. Knight Foundation's High School Initiative, *Future of the First Amendment, What High School Students Think About Their Freedoms, at* http://firstamendment.jideas.org/index.html (visited Apr. 5, 2005).

69. Frederick Schauer, *Symposium: New Perspectives in the Law of Defamation: The Role of the People in First Amendment Theory,* 74 CALIF. L. REV. 761, 768 (1986).

70. *Id.*