

ROUNDTABLE

First Amendment on Trial—The Libel Lawyer's Perspective*

PROFESSOR DAVID SKOVER: Good afternoon, and welcome to the symposium on *The First Amendment on Trial: The Libel Lawyer's Perspective*. In several significant ways, this event is a first. It is the first symposium to be held in Seattle University School of Law since the recent dedication of our magnificent new building. It is the first symposium of its kind ever to be held in the great Northwest. Furthermore, law school and law review symposia typically focus more on free speech theory than they do on the First Amendment in practice. As the *Seattle University Law Review* will be transcribing and publishing an account of this event, I thought it would be interesting to do a quick electronic search for free speech symposia in law journal literature. To my knowledge, then, this will be the first law review symposium to feature only prominent figures in the First Amendment libel trenches, those who face the daunting challenges of libel law on trial. Finally, this is surely the first symposium to gather the particular panel of distinguished libel law experts here today.

Before I introduce them to you, allow me to comment briefly on one of the most dominant tensions in the libel law arena. Paul McMasters, the First Amendment ombudsman for *The Freedom Forum*, succinctly captured this tension when he wrote, "[T]here is much unsettled and unsettling about an area of law that so profoundly affects how journalists do their job and how the people get their news. On the one hand, libel suits are a necessary recourse for those who

* This is an edited version of the transcript of a roundtable discussion held in November 1999 at Seattle University School of Law. Participants included Professor David Skover, Seattle University School of Law, who moderated the discussion; the Honorable Robert S. Lasnik of the United States District Court for the Western District of Washington; Sandra Baron, executive director of the Libel Resource Defense Center; Ronald Collins of the Center for Science in the Public Interest; John Shaeffer, partner at the firm of O'Donnell & Shaeffer; and Bruce Johnson, partner at Davis Wright Tremain LLP.

believe that they have been wronged by the press. On the other, even the threat of a libel suit can serve as a subtle censor of the press."¹ It is difficult to disagree with Mr. McMasters. Individuals who claim reputational injury from news stories often point to the U.S. Supreme Court's landmark 1962 decision in *New York Times Co. v. Sullivan*² and its progeny to complain that too much legal protection has been guaranteed to the press. They feel that they are trapped in a Catch-22. Just at the point that they enjoy enough public recognition to show a real injury to their reputation, they risk becoming public figures who are unlikely to prevail in litigation against the press.

In contrast, recent developments demonstrate how the mere prospect of an expensive and time-consuming libel suit is often enough to drive the press to self-censorship. Excessive caution by publishers threatens to undermine the First Amendment goals for a free press, in the words of Justice William Brennan, "uninhibited, robust, and wide-open public discourse."³ Consider only a few examples from 1999. Oprah Winfrey, America's most popular TV talk show host, broadcast a program entitled "*Dangerous Food*," and was sued by Texas cattle ranchers in federal district court, alleging that she libeled the beef industry. Winfrey prevailed at the trial level in that litigation, but for a defendant who is not as well-heeled as Oprah, the very threat of a product disparagement suit may be enough to silence the whistle-blower.

St. Martin's Press recently recalled a biography of Presidential candidate George W. Bush, entitled *Fortunate Son*, that accused him of being arrested once on cocaine charges. The revelation, contained in the afterword to the book, was based on three anonymous sources. When the Bush campaign flatly denied the charges, and the identity of the author as a former felony convict was uncovered, the mass media struggled over whether or how to handle the events, for fear of being accused of republishing a libel. It was Internet-based journals like *Salon*⁴ and the *Drudge Report*,⁵ and not the traditional mass media, that were willing to put the story into play. *Salon*'s senior vice president explained: "[T]he Internet generally [isn't] really interested in the corporate-gatekeeper model of deciding [what to publish]."⁶

1. Paul McMasters, *Libel: Subtle Censor of the Press*, THE FREEDOM FORUM ONLINE, posted at <http://www.freedomforum.org/first/1999/1/4/ombudsman.asp> (published January 4, 1999).

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

3. *Id.* at 270.

4. See <<http://www.salon.com/>>.

5. See <<http://www.drudgereport.com/>>.

6. Howard Kurtz, *Bush Accuser Is Said to Be Ex-Convict*, WASHINGTON POST ONLINE, posted at <<http://www.washingtonpost.com/wp-srv/Wplate/1999-10/22/1241-102299-idx>>.

There is also the recent *Food Lion*⁷ litigation, about which more will be said later.

This afternoon we are fortunate, indeed we are honored, to have five highly able and widely recognized experts to discuss these and other thorny issues pervasive in a libel law practice. Allow me now to introduce them. To my immediate right is Judge Robert S. Lasnik, who has sat on the U.S. District Court for the Western District of Washington since 1998. Judge Lasnik previously was Chief of Staff in the King County Prosecutors' Office and a King County Superior Court Judge. He graduated with a masters degree in journalism from Northwestern University.

To his right is Sandra S. Baron, the Executive Director of the Libel Defense Resource Center, a nonprofit membership organization of media entities, associations, foundations, insurers, and law firms nationwide, located in New York City. Ms. Baron oversees the association's promotion of First Amendment rights in libel, privacy, and related fields. She previously served as Senior Managing Attorney at NBC, as Associate General Counsel of the Educational Broadcasting Corporation, and as general counsel of American Playhouse. Moreover, she is the co-author of a major treatise on libel law.

To her right is Ronald Collins, the director of a First Amendment project at the Center for Science in the Public Interest in Washington, D.C. Mr. Collins undertakes legislative and judicial battles against state food disparagement and product libel laws. He recently co-authored an amicus brief in support of Oprah Winfrey's defense in the beef-libel case before the U.S. Court of Appeals for the Fifth Circuit⁸ and has written on the subject of product disparagement.⁹ Many of you also know him as my co-author of our book, *The Death of Discourse*,¹⁰ and our forthcoming work, *Comedy on Trial: Lenny Bruce's Struggles for Free Speech*.

To his right is John Shaeffer, one of the founding partners of O'Donnell & Shaeffer in Los Angeles. Mr. Shaeffer practices in the areas of intellectual property, entertainment law, libel, and privacy. He recently represented the writer Barbara Chase Riboud in her copy-right claim against the film *Amistad*, and represented a consortium of journalists and newspapers in their successful effort to open to the public Jeffrey Katzenberg's compensation claim against Disney.

html> (published October 22, 1999).

7. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

8. *Texas Beef Group, et al., v. Oprah Winfrey*, 201 F.3d 680 (5th Cir. 2000).

9. Ronald K.L. Collins, *Free Speech, Food Libel, and the First Amendment . . . in Ohio*, 26 OHIO N.U. L. REV. 1 (2000).

10. RONALD K. L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (1996).

Finally, to his right is Bruce Johnson, a partner in the Seattle office of Davis Wright Tremaine. Mr. Johnson is well-experienced in defamation and privacy defense, having represented the media in a number of First Amendment cases, including *Auvil v. CBS 60 Minutes*¹¹ and *CBS, Inc. v. Davis*.¹² Each panelist will now be given five minutes for an opening statement. These statements will highlight what in their opinions are the most prickly problems for libel law practitioners today. After these introductory remarks, the panel will engage in a roundtable discussion of several hypothetical scenarios that I will present to them. We will end the discussion so as to leave time for you to pose your own questions. And when that time comes I urge all of you to exercise your First Amendment rights freely. Let us begin, then, with opening statements. Sandra, would you grace us, please.

SANDRA BARON: I want to thank David Skover and Seattle University School of Law for inviting me to participate in this symposium on the litigation of libel. Because of my background, I tend to take a relatively pragmatic perspective, and what I see are a number of issues that make this litigation challenging for defendants. Lest they go unsaid at all in this discussion, as fraught with emotions as divorce, I thought I would mention just three.

One is so-called libel by implication. The second is actual malice, and specifically here, because actual malice can cover a wide range of sins or issues in libel litigation, overcoming plaintiffs' efforts to prove malice by the accumulation of circumstantial bits; e.g., a failure to interview a particular witness here, a failure to reach the plaintiff to comment there. Piling them one on top of one another, hoping that the sum will equal actual malice. And finally, while perhaps not on Professor Skover's list of what he meant by difficult libel litigation issues, I think I should mention the high, if not prohibitive, cost of litigating libel cases. Cost can be virtually determinative of libel litigation for small publishers, and is a factor I would suggest in almost every libel litigation.

With that I am going to double back a little bit and start with libel by implication. This complaint can be brought even when much, if not all, of what is actually said in a publication is true or is not otherwise subject to liability. It is a plaintiff's charge that the publication is libelous because the reader or the viewer or the listener can come away with an impression from the totality that is defamatory. I

11. *Auvil v. CBS 60 Minutes*, 67 F.3d 816 (9th Cir. 1995).

12. *CBS, Inc. v. Davis*, 512 U.S. 753 (1994).

can tell you that when asked, media defense counsel list this as a libel litigation challenge more than any issue in libel litigation.

Litigating claims of libel by implication is really an attempt at shadow boxing. You are suddenly defending a statement that the reporter or writer did not make, that he and his editors did not see in the publication, that you cannot perhaps defend as true, or, even worse, that your reporter believes may be false. The arguments, I can tell you, quickly play out in all sorts of various alternatives. You start with what did the story mean, convincing the judge or maybe a jury it does not mean what plaintiff says it does, or that the implication, while plausible, is not the most reasonable, or certainly not the only one. Or, if the implication *can* be understood from the story, that it is protected opinion. Or, and ultimately I would suggest to you this is how most cases are litigated, proving you were not at fault; in an actual malice case, that you did not know you were publishing a defamatory implication.

I am going to note that the press, I think, is increasingly winning the argument that, at least in cases where actual malice is the standard, the plaintiff must prove that the defendant knew the implication was in the piece as well as knew it was false. And in some jurisdictions, libel by implication claims simply cannot be brought when the plaintiff is a public figure or public official, or when the underlying facts of the story are true and the subject matter is one of public concern. These are not yet, however, universal approaches.

Actual malice is the second difficult litigation issue. Because of the enormous cost of litigating, both in financial and in human terms, the utmost goal of most libel defendants is to win a case before trial. Oftentimes they will move for summary judgment on the issue of the inability of the plaintiff to prove the defendant published false, defamatory statements of fact with actual malice. That is, for those of you who are not familiar with the actual malice standard, knowing that what was published was false or with such reckless disregard for truth as to be tantamount to publishing knowingly false statements.

I think you can start from the premise that this standard is counterintuitive for many jurors, and for some judges as well. There is a tendency, I think, to assume that if there is a mistake in the story it is the defendants that should suffer for it. And in some jurisdictions, I will tell you, judges—regardless of what they think of actual malice—are reluctant as a general matter to grant summary judgment motions. Moreover, I think you have to take as a given that every story, every book, and every article is going to have some flaws in the text or in the preparation, or most likely in both. These are, after all, human

endeavors we are talking about. In addition, reporting has some altogether unattractive attributes. Sometimes reporters are hard-sale. Sometimes they are demanding. Sometimes they are soft and sweet, even when the end result is going to be a very hard-nosed investigative piece. Sometimes they use sources that judges and juries don't like. There is always going to be more, I can assure you, the reporter could have done in preparation of the story. And with outtakes in television available for everyone to review, there will always be evidence of material that could have been included in the story.

So then what should constitute sufficient or adequate evidence to deny the defendant summary judgment on actual malice? The challenge for a lot of counsel is to overcome both initial antipathy for the actual malice standard and antipathy for summary judgment, and ultimately, counsel must help the judge, or jury if it comes to that, understand how a reporter works, what is acceptable, even if unattractive in reporting, and what is acceptable and what is not, as proof of actual malice.

SKOVER: Thank you. John, would you like to make your statement?

JOHN SHAEFFER: I come from kind of a different background from my colleagues in that I'm a person who prosecutes libel cases, so I bring a different theory to this type of discussion. First thing, I think it's important to understand that when we're talking about libel, we are talking about First Amendment issues. Those who tend to represent defendants like to focus on respected journalistic reporting. But in actuality libel is much broader than that. Not only does it cover journalism, news media, the media and its proliferating news shows, but the ugly stepchild, tabloid journalism. An area I've been involved in a lot recently is books, which pose even different issues in terms of libel. Typically, in most journalism, there is a rush to get the story out because news has a short time frame. When you're dealing with a book you usually have a longer time frame, and as a person representing plaintiffs in these issues, my approach to a book tends to be very different than the approach to a newspaper story. Finally, the one I'm finding most interesting now is in the area of entertainment. I was talking to my colleagues this morning about an instance that came up in my practice recently. I represent the pharmaceutical company Pfizer. Last season, on the show *Law & Order*, Julia Roberts tried to kill her lover using one of my client's drugs, Viagra.¹³ Does that pose any libel type issues? Well, I'm also defending litigation for Pfizer

13. A virtually identical plot starring Victoria Principal aired on *The Practice*, (ABC television broadcast, Apr. 2, 2000).

right now because people are claiming causal relationship between heart attacks and the ingestion of Viagra. Was there any basis for *Law & Order* to do this? It's also interesting because shows like *Law & Order* hold themselves out as being reality-based, or stories based somehow on the truth. Did viewers take away from that show a belief that Viagra actually could cause a heart attack? Ultimately, we decided it didn't make any sense to publicly pursue litigation.

I think the main point that you will hear from my perspective is that despite the lamenting you'll hear from my colleagues on the defense side, the decks are about as stacked against a plaintiff as they possibly could ever be. Probably the most important factor is publicity. When a client comes in and says, "I've been defamed by this piece on 20/20, or by this piece of journalism, and I want to sue," I tell them that by suing, you will draw significantly more media attention to the story than probably was there before. A good example is the new movie, *The Insider*. I don't know if you've seen all these Brown & Williamson ads saying this movie's not true because of XYZ and all these other reasons. Well, they are creating controversy, creating advertising for the show. More people are going to go see it, and more people are going to hear the bad statement. Libel actions live a lot longer than media stories. The public's attention is about five or ten minutes for the types of stories that make the newspaper. When you sue it goes on forever. One of the great examples is Carol Burnett's victory over a tabloid which, a number of years ago, accused her of being drunk in some restaurant.¹⁴ That litigation went on for years. And even though the case ultimately settled, the story was in the public consciousness every time there was a decision.

Defendants, the big media companies, always complain about how expensive these types of claims are. They're also very, very expensive from the plaintiff's perspective, many of whom tend to be individuals. There was an article recently in the *L.A. Times* in August about a group of lawyers in Los Angeles who do this tabloid type of litigation on behalf of stars. Well, if you look at most of those cases, they drag out for long periods of time. While the star may ultimately prevail, he or she is awarded \$100,000, \$2, whatever it is, to the point that clearly it was much more expensive to prosecute this libel claim than they ultimately recovered.

Finally, let's look at what happens with these cases. First of all, my client's upset because the story's not true. Well, it doesn't matter if it's true or not. The class or the defendant can prevail, even if the story's false. So let's look at the result of the case. I can prove the

14. *Burnett v. National Enquirer, Inc.*, 144 Cal. 3d 991 (1983).

statement was false but lose because it wasn't reckless, so the public perceives the story as being true. I can win proving actual malice, but be awarded little or nominal damages. The public still believes that the media has prevailed. So, in most instances caution against bringing a libel action and try to address these concerns before they reach the press.

I do think it's important to understand perceptions. People in the media business believe right now, because of the state of law, that they're under siege by litigation that is restricting First Amendment rights among the press. I think it's been very important for us to understand that freedom of the press is broader in the United States than any country in the world. While there may be some nibbling back at the corners, these inroads are nothing compared to the risks the media faces in places like England, where Tom Cruise recently prevailed on his claims against a tabloid.

The public perceives a level of arrogance amongst the media. But I come here to make a bold statement that I'm actually the advocate of the public in these claims. In all respects except one, which is the public's right to know. But you do see a real clash between the public's right to know and the public's belief that there are notions of privacy that are held by all of us, and many times the media can lie, cheat, and steal to get a story, but the public sees that as wrong. So what's the problem? I think the problem we're seeing today is a problem of mass and velocity. Right now there's a lot more information coming out, and the rush to get it out is intense. What previously was given a couple of pages is now a sound bite. You may have a hundred facts necessary to tell the story. The newspaper editor must now tell the story with only five or ten. And obviously he's going to spin those facts in a manner that will draw interest to the story. That is where the conflict is.

So what am I doing now? Well, typically what I do in many of these cases is I try to get the story before the story goes to press. I have worked many times with books. I represented a prominent music publisher who was being defamed horribly in a book that was about to come out. We were able to get to the book before it came out, resolve a lot of the issues, to the point that the book became very boring. But our battle was the press, the book publisher wanted these sensational facts in there and wanted to use our controversy as a basis to sell books. There we were successful because I doubt anyone in this room ever read the book. The book came out and no one knows who I represented, so I think we were successful. The last thing I do, and I know my time's running out, the last thing we do now in this broader

economy we have, that is we sue in other countries. I've advised clients to sue in France, I've advised clients to sue in Ireland, where the First Amendment rights are not as broad. And we're prevailing in those. So these multinational corporations with great protection from the United States don't have those protections in the other countries, and I think that's going to be a real proving ground.

SKOVER: Thank you, John. Judge Lasnik, would you make your opening statement?

HON. ROBERT LASNIK: Thank you. My perspective, of course, as a jurist watching some of these cases come through, is different than the advocates here but it's very representative of what you see, in that each one tries to cloak their side with truth and justice and the American way, and each one attempts to posture themselves as sort of the little guy up against the big enemy. And when you represent CBS or the *New York Times* it's hard to convey the impression that you're a little guy. But even when the media client is a little guy I think you'll see that the lawyers who represent the media try to be aware of every case out there, because the wrong case that goes up without proper representation can affect their clients down the road. So they're – if you pick a fight with any media organization you should expect to have a nuclear war on your hands. In a case that I handled with Bruce's law firm, it looked like a very small case, involved a *Seattle Weekly* person, who was not particularly a famous person, who just felt that he was treated very shabbily in a particular article. And a solo practitioner plaintiff's lawyer took the case for him, and the discovery that ensued over the next few months was so overwhelming to this lawyer and so pervasive about the background of the plaintiff. He's seeking damages, that opens up all sorts of areas of his background for questioning about tax returns and financial dealings and whatever. I think by the time I granted the summary judgment for the media, I think that the plaintiff and his lawyer were relieved to get out the case. They couldn't just withdraw but they certainly were not anxious to fight again another day. The other thing I've had a lot of experience in, as Chair of the Bench Bar Press Fire Brigade in the State of Washington, to try to put out flare-ups that occur in the courtroom revolving around media issues. I think I have a lot of friends in the media. The one time they cringe is when I'm doing a case and I'm talking to a jury ahead of time, and the issue is pretrial publicity and do we need to close the courtroom, do we need to move the trial into another venue. . . . I engage in a little discussion with potential jurors about how many of them have ever had something that they were personally involved with covered by a newspaper or television. And most peo-

ple's hands will go up. Something happened at their school or their job or that they were involved in. And I'd say, in those circumstances how many times did the media get it right, and nobody's hand goes up. And I say, well, why do you expect that they got it right in this case either, so just set aside whatever you read about this particular case and we'll just move forward. And the heads nod and they say yeah, you know, that's true. So the media wins because they get to stay, but they always come up to me afterwards and say, "I don't know whether I really like the way you did that, judge, but we are glad we get to stay in the courtroom and cover." I think it's fair to say that the media does not hold a very high regard in the public for accuracy, for fairness, for the things that they have aspired to. There are many reasons for that, some we can talk about here today. But the fact of the matter is, I think when you come right down to what makes this a great country in terms of our government system, two of the things you have to look at are an independent judiciary, which is virtually unique, and freedom of the press and freedom of expression in the First Amendment, which likewise is almost unique in the world. Thank you.

SKOVER: Thank you, Judge. Bruce, would you give us your statement, please?

BRUCE JOHNSON: I'd like to divide my statement into three parts. The first part I'll call "context and inspiration." The second part I call "kvetching." And the third part I call "fears about the future." Let me start with context and inspiration. It's important for us to recognize and never forget that modern press freedom was a gift of the civil rights movement. The extent to which the American media forget that this is not a great corporate success story but is in fact the success brought by very, very hard working, struggling people who battled largely in the South (but also in the North) for civil rights laws a generation ago cannot be overstressed. And when you defend a libel case, when you have to stand in front of a jury, it's very important to remember this is a right which was won for all of us. Not simply by corporations, but by individuals who were struggling for freedom. This was brought home to me three weeks ago when I made a presentation in Warsaw as a guest of the Polish Journalists' Association and the Polish Press Freedom of Monitoring Center. I was asked to discuss American press law with these journalists who came not simply from Poland, but also from Hungary, Belarus, Ukraine, Romania, Bulgaria, Yugoslavia, the Czech Republic, and even Russia. This was ten years after the fall of the Berlin Wall. One of the people I spoke to on that trip, a friend of mine in Latvia, recalled a cold Christ-

mas night many years ago in the Latvian Socialist Republic in the Soviet Union when she happened to break out in a song that she had heard somewhere, which was *Silent Night*. This was in the U.S.S.R. Two of her colleagues quickly cautioned her not to use that song and to quiet down immediately, because she could be reported for singing *Silent Night*.

When I made my presentation to the Polish gathering, I was trying to explain American press law and American press freedom, and said, "I don't know if I am the one to explain press freedom to you. Within the last ten years you have reconstructed civil society. You have created civic morality out of nothing. You have brought to bear within the Soviet empire something which is not simply uninhibited, robust and wide open, but something that goes to the heart of all of us." So I felt very modest in talking about press freedom, but some of the Poles, the Eastern Europeans, looked at me and said, "When we were in the Gdansk shipyards in 1980 and 1981, we sang *We Shall Overcome*." All of this press freedom in the United States, and indeed in Europe and in the former Soviet Union, is of a single origin. It comes from people being willing to struggle—not simply the media, but all of us, willing to struggle for our rights.

Even freedom, of course, is a double-edged sword. One of the other points ironically made by the journalists in this Warsaw gathering was, while we struggled for our rights, nobody is reading us now. They are living in a very typical, very modern, normal society again, and folks are tuning them out oddly enough, and that was one of the major complaints among reporters. They also complained about their salaries, so we are clearly arriving at Western society bit by bit. But it's important to remember that inspiration, because *New York Times v. Sullivan* was itself the product of a struggle to call attention to very important injustices in this country.

Kvetching. I'm going to divide my kvetching into three different categories. First, the law. The largest single concern I have about the law dealing with the media derives from a 1991 U.S. Supreme Court case, *Cohen v. Cowles Media*.¹⁵ It concerns a Minnesota newspaper which decided to reveal the name of a confidential source, who was actually an operative for a political opponent, and the U.S. Supreme Court held that the First Amendment did not bar a state law claim for promissory estoppel damages by that source against the newspaper. The Court went on to hold that the First Amendment is not implicated when laws of general applicability are used against the media in connection with news gathering torts. That area of the law is still very

15. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

unsettled, as recent decisions in the *Food Lion* case within the last month will show you. But it's not just the law. It's judges and it's jurors. Last week, at a dinner organized by Sandy Baron's group, the Libel Defense Resource Center, Abner Mikva reminded the crowd that when he left the D.C. Circuit bench and became White House counsel, he told the media, "Watch out, there is a backlash among the judges." At the same dinner, Nina Totenberg, an N.P.R. reporter, talked about the Supreme Court's attitude and the media, and it was very succinct. She said, "They hate us." She described the mood as similar to Jackie Gleason's classic comment, "One of these days, Alice, it's going to be Pow! right in the kisser."

But it's not just judges. Jurists also are reflecting attitudes of distrust and alienation from the media. Floyd Abrams, a leading First Amendment lawyer, has suggested that the press will pay dearly for the Bill and Monica story. In a recent survey of Americans sponsored by Freedom Forum, fifty-three percent of respondents said that the press has too much freedom. That's a majority. And this is up from thirty-eight percent in 1997. Two years, from 1997 to 1999, thirty-eight percent to fifty-three percent disapproved of media rights. In the same study, sixty-five percent of Americans say that the press should be free to publish freely without government approval of its story. Isn't that nice of them? That's down from eighty percent two years earlier. And those supporting the media's right to report government secrets, also a basic First Amendment tenet, have dropped from sixty-one percent to forty-eight percent, not even a majority now. So we're starting to discover that people are reflecting some of these concerns that some of the other panelists have mentioned about the media.

Finally, the future. The future is largely the Internet. The Internet provides an opportunity for the graffiti on the bathroom door to appear worldwide. We have a media Internet journalist, Matt Drudge, who proudly claims that he gets his facts right eighty percent of the time. One commentator has characterized the Internet as the "Net of a thousand lies." In the future, if the Internet continues as it appears to be moving, everyone—you, I, and everyone in this room—will have an opportunity to be a reporter. But nobody will be an editor. And that will have profound consequences for the quality of the discourse, the quality of the information, and potentially, for legal liability.

Finally with regard to the Internet, and John mentioned it briefly, it's an international phenomenon. One of my partners handled a case recently where a plaintiff with a libel judgment from the U.K.

sought to obtain enforcement in Maryland, and the Maryland Court of Appeals, in a decision which rang of Patrick Henry and George Washington and Benjamin Franklin said, "Not in America; we don't have that kind of thing here. We have the burden of proof on the plaintiff, not on the defendant," and the court simply refused to enforce the judgment.¹⁶

But that particular defendant had the opportunity to fight this battle because he did not have any resources in the U.K.. If you're the *Wall Street Journal* in Singapore, *Time* magazine in the U.K., or virtually anyone in France, you will have to fight those battles where they arise. When John brings the battles they will likely take place there.

So we're likely to see international libel law to a degree that we would never have expected 25 years ago, which leads me back to the original point. And that was, that all of us are in this together, and that what happened in Montgomery, Alabama thirty-five years ago is very important, not only for Warsaw today but hopefully for other countries around the world, and I hope we don't forget it. Thanks.

SKOVER: Ron, would you like to contribute your thoughts?

RONALD COLLINS: Well, it's wonderful to be back in the Pacific Northwest and to have left one Washington on the East Coast and come to the other one here on the West Coast. And a big thank you to Seattle University School of Law, where I have had the privilege of teaching as a visiting professor.

Much what you've heard today might lead you to believe that the First Amendment libel fight is between the media, (that is, the defense bar) and those who sue them (that is, the plaintiff's bar). John believes that the deck is stacked. Indeed it may be. If that is a true statement, just how is it stacked? Who is favored by this deck? As someone who works for a public interest group, I don't feel beholden to media groups or to those who complain of the media's excesses. I feel that there is a public interest at stake here, public interest in the First Amendment.

It was Harry Kalven, the great First Amendment scholar who wrote *The Negro and the First Amendment*¹⁷ who talked about the First Amendment as being essentially very important to everyday citizens. The citizen as critic, the citizen as consumer, the citizen who could take that right and exercise it in a way that he or she could become a better citizen. At least, that was the free speech idea. Well, from that vantage, how does the First Amendment work in a context where you the public, you the people, are to receive information? Are you receiv-

16. See *Telnikoff v. Matsusevitch*, 702 A.2d 230 (Md. Ct. App. 1997).

17. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1966).

ing more information? Are you receiving better information? These questions point to the relationship between the First Amendment and self-governance. Does our law, as constituted and executed, allow for real self-governance? I wonder. Without yielding to undue cynicism, it is well to keep in mind the lessons of realism, especially in the face of romantic idealism. It is well to know the law and the lesson as printed in *New York Times v. Sullivan*, but it is equally important to know the *realism* of that case, how it translates in practice, how it translates in courtrooms, how it translates in lawyers' offices, or how it translates in that dynamic between a lawyer and author, or between a lawyer and activist. You know from reading *Sullivan* that seditious libel is dead letter law. You've read the case and you know that. In other words, seditious libel is something that people in Thomas Jefferson's day worried about. I mean, who worries about seditious libel anymore? We can say whatever we want about Bill Clinton, and we do. So do we any longer have seditious libel? I think we do. Let me explain.

Believe it or not it is a *crime*, it is against the law, ladies and gentlemen, to disparage food in Colorado.¹⁸ Think about it. You could make remarks about a lemon and find yourself in jail. Now, this law wasn't something that traced back to the 18th century. It was passed in 1994 in this very decade. It makes it a crime to speak ill of food. Now, it makes you wonder if indeed the deck is stacked. But against whom is it stacked? I say it is stacked against the citizen, the critic who wishes to speak out on public issues. Quite often the laws are so stacked that one thinks twice before making a statement. In other words, one self-censors. Well, the bad news is Colorado.

The good news, and this reveals just how relative things are, the good news is that in twelve other states it is just a *civil* wrong to speak ill of food. Thus, for example, if you're in Alabama,¹⁹ you cannot go to jail for criticizing an agricultural product. You can only be sued for general and punitive damages. And, in Ohio,²⁰ not only can you be sued for general and punitive damages, but a successful plaintiff can obtain attorney's fees. Notice I said the successful *plaintiff*, not the successful *defendant*. Now, from the vantage point of uninhibited, robust, wide open information, how much information can be conveyed to you if in Colorado you can go to jail for saying certain things disparaging food because it may be dangerous for XYZ reasons? In

18. See COLO. REV. STAT. 35-31-101 (1998); see also Thomas Kelley & Ronald Collins, *State's Food Law Is a Real Lemon*, DENVER POST, Sept. 19, 1999, at H4.

19. ALA. CODE § 6-5-662 (1993).

20. OHIO REV. CODE ANN. § 2307.81 (Banks-Baldwin 1996).

Alabama, you can be sued for punitive damages. In Ohio, punitive damages plus attorneys' fees, etc., etc., etc. Now, my experience in a public interest group is that, a lot of times, reporters or activists or others will come to me and say, "Can I say this about a particular product? Not about product XYZ, but just generally about oranges or what have you." And I have to respond: "Yes, you can say it. This is a free country. This is America. Stand on your First Amendment rights. But it may take three years of litigation, all right?"

The Oprah case,²¹ you all know that. Oprah, she won the case. At the end of the trial there was Oprah's glorious statement: "The First Amendment rocks." Well, sure, it rocks. It's rocking to the tune of millions of dollars in litigation costs. That case is in its forty-fifth month of litigation—forty-five months of litigation, seventy-some volumes of trial transcript, millions of dollars of attorneys' fees. Why? Because Oprah Winfrey and Howard Lyman said something about cattle, or about hamburger. The sole issue that has been litigated thus far, and this gives you an idea of Sandra Baron's concerns about the costs of litigation, is whether live cattle now on the hoof are an agricultural product within the meaning of the statute. Most public interest activists cannot afford that kind of litigation. They cannot afford to litigate. Indeed, I agree, John, the decks are stacked. How they're stacked is another matter.

I think it's important to foster idealism . . . up to a point, and I think it's a very heartening and important idealism that you find in reading cases. It is also to appreciate the inspiring side of important cases like *New York Times v. Sullivan*. But there is also the reality of how those cases, day in and day out, become law in peoples' lives, in terms of the courtroom, in terms of the office, and in terms of the decisions as to what a person can or cannot say.

SKOVER: Thank you. Now, ladies and gentlemen of the audience, you can see how lively, informative and entertaining a discussion we're likely to have. Let us now proceed to our first scenario, The Case of Libel by Fiction. David Lodge's novel on ideas, sex, and politics in current academic circles of rhetorical studies, entitled *Small World*,²² introduces a character named Professor Zapp. One of the most celebrated postmodern theorists on the lecture circuit, Zapp is a rather conceited and opportunistic type, who takes full advantage of the sexual favors offered him by fawning graduate students. For those in the know, Zapp's ideas with respect to text and meaning appear virtually identical to those of a real-world postmodern scholar, Stanley

21. *Texas Beef Group, et al., v. Oprah Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998).

22. DAVID LODGE, *SMALL WORLD: AN ACADEMIC ROMANCE* (1984).

Fish. Although Zapp is not described as bearing the same physical characteristics as Stanley Fish, soon the buzz rages within and outside of rhetoric departments that Zapp is meant to be Fish. Even legal academics begin to notice the similarities in their intellectual agendas, like Professor Pierre Schlag, formerly of Seattle University School of Law, who writes an article entitled *Fish v. Zapp*.

Assume that, at university cocktail parties and academic conferences, Stanley Fish is increasingly subjected to mean-spirited teasing. Unkind comments run the gamut from the merely irritating, "It's a small world after all, isn't it, Stanley?", to the utterly embarrassing and leering wink-wink, "Hey, Zapp, how do you manage all that extracurricular activity?" Finally, after a particularly graphic and perverse comment, Fish is pushed over the edge, and he consults his attorney about a libel suit against David Lodge, the creator of the character Zapp. In the postmodern world of fiction, where we merge the boundaries between fiction and nonfiction all of the time, what are Fish's realistic and appropriate prospects of recovery for libel by fiction?

SHAEFFER: I guess I need to start, since I am the person that the professor would come and see. Really, this is the issue of whether or not there is association with the real character. I like this case from a libel perspective for a particular reason. One of the greatest hurdles to get over is actual malice. If I can make the link, if I can show people associate this Zapp character with Stanley Fish, I've got actual malice, or an easy case to the jury of actual malice. The problem I see, though, is the narrowness of the group you're talking about here. I mean, how many people study postmodernism—how am I going to sell this postmodernist rhetoric to a bunch of postal workers on a jury? And the other problem you have with the case is the linkage of the theory with the sexual conduct. Are people going to associate Stanley Fish with the sexual conduct? But in terms of a libel case, this is one that I would like more than most.

BARON: First, it is worth looking at some basics about the law. What John is not telling you I think clearly enough is that he has to make the case that this book is "of and concerning" his client. That is a basic tenet in libel law. It is one of the first issues that you would have to face. Now, as a general matter, it is not very difficult to prove that a given statement is "of and concerning" the plaintiff. For example, with regard to a news story that the mayor of Seattle is taking bribes, it is not hard to figure out who it is "of and concerning." But when you deal with a fictional case like this, I think John may have some serious difficulties, particularly if the depiction of our fictional

professor really is different in like and kind but for ideas, proving that this book is really “of and concerning” his client.

SHAEFFER: Well, let’s say how do I do that real quickly. All I have to do is bring in David Lodge’s friends and associates and have them say how much David hates Stanley Fish, how much he’s jealous of this guy, how he wants to destroy his reputation, and I am beginning to make a circumstantial case about “of and concerning.” If I don’t have that evidence and I’m simply left with this, I’ve got a harder case.

COLLINS: Of course, the “of and concerning” requirement is a very important portion of *New York Times v. Sullivan*. In essence, it says it is not enough to attempt to libel somebody generally. For libel to exist it must be particularized. A particular person, particular time, particular place, and some clear identity. Let me explain. The problem is whether the alleged libel involves Stanley Fish the man, or does it involve something else? Does the criticism run to Fish the academic, or is it Fish the pervert? In other words, I may well grant what John says. Yes, Lodge is very critical of Stanley Fish. But only Fish as an academic man. This other matter is totally unrelated. There’s no link, if you will, between the academic criticism and the other.

BARON: Can we just note that in this little brief back and forth you have already gotten a hint at why libel litigation is so long and so costly? Did you hear the word “discovery” in John’s voice, because he is going to want to know a whole lot? With respect to the writer, John is going to want discovery about what he knew, what he thought, what he felt, what he has ever written before, and what he has ever done. And we are going to want substantial discovery from his client. So you might want to listen for that as we talk about these issues and the extent of the litigation process. By the way, in international law you will find there is very little discovery, or at least a lot less, and that is an enormous detriment to at least defendants—I cannot speak to plaintiffs—so while I am critical on some level of the cost of libel litigation, I am certainly in agreement with many of its benefits.

SHAEFFER: Well, let’s pick up on that discovery issue. I may have to discover what David Lodge thinks of Stanley Fish, but what is the defense going to do to my client? They’re going to go after him to see if this stuff’s true or not. They’re going to dig up everything about him. Maybe he actually is a pervert.

JUDGE LASNIK: There are some plaintiffs who are actually libel-proof plaintiffs, because their reputation is already so terrible there isn’t anything you can do to drag them down any lower, and certainly

a vigorous defense counsel will attempt to probe and see if this particular plaintiff might fit in that category.

SKOVER: Of course, Judge, you're not implying anything about Stanley Fish in your comments, right? We have to make sure that Stanley Fish is not libeled here today.

SHAEFFER: Well, I just had that situation involving a recent ad campaign by Reebok that stated that a fighter was found mentally unfit but able to fight. They were worried that Mike Tyson was going to sue them for libel.

JOHNSON: One of my California partners recently handled a case involving a *Globe* newspaper tabloid, and the tabloid headline on the front said, "*Cops Think Kato Did It.*" You had to go inside and find out that they thought he had done perjury, committed perjury.

BARON: No, in fairness to the *Globe*, there was a subheading on the cover of the tabloid that arguably clarified the initial heading, but the article was 17 pages back.

JOHNSON: All right, that's fine.

BARON: Read the smaller print.

JOHNSON: One of the problems with the "of and concerning" test is that it makes my eyes glaze over. I have tried to explain the "of and concerning" rule to judges, and I can assure you it is not an easy one to explain or to fit into the litigation model. And as a matter of fact, one of the points that underlies John's statement is that once the plaintiff gets past "of and concerning," which may not be that hard if there's a judge who is not particularly thoughtful or thinking, he or she may actually have a straight shot at a jury verdict involving substantial money. Works of fiction are particularly at risk, because under an actual malice test, if I am writing a work which I know and believe to be fiction, the question that can be posed to me as the author is, "Did you believe this?" "No. It's not true." And you suddenly have actual malice established as a matter of law because you didn't believe it at all. So the fictionalization cases present real risk if this "of and concerning" test or other tests are not adequately applied early on. If they aren't, you can find yourself in front of a jury with the potential for a large adverse judgment.

COLLINS: Given what Bruce has just said, it is of no great moment whether or not Stanley Fish is a public figure. I mean, that added level of protection when you're dealing with public figures doesn't help in this the situation if you can establish actual malice.

SKOVER: Now panelists, I would like to give you a variation on this scenario. Would it make a difference in your analysis if an ultra-conservative political commentator, who has long decried any consid-

eration of Harvard Law Professor Laurence Tribe to the Supreme Court as a disaster to the country, were to write a novel called *Hypocritical Overtures* about a Harvard constitutional law professor named Larry Trine, who makes harassing sexual overtures to his female research assistants, similar in nature to those charged by Anita Hill in Justice Clarence Thomas' Senate confirmation hearing pubic hairs on Coke cans and all. Assume that the copyright page of the book declares "any similarities in the characters of this book to persons living or dead are merely coincidental." Also assume that in a magazine interview, the author explains that he always wanted to write a fiction story, and neither intended to track, nor did, in fact, track any of his prior political statements about Laurence Tribe.

SHAEFFER: I guess I get to go first again. This raises another issue if a person presented the same facts surrounding Clarence Thomas attributed them to Larry Tribe, it almost becomes a parody. The more outlandish the things written, the more likely the defense of a parody comes into play. The second point raised by this variation is whether or not the copyright disclaimer—the claims that this is supposed to be fictional—would have any bearing. I mean, to me they're simply self-serving statements, and really do not complicate the whole thing here. I think this type of scenario is important, because it does get beyond what the others said in their opening statements in that libel addresses a number of things beyond true, good reporting. Why is someone writing something like this? Is it going to be a million-seller book, or is this a personal attack on someone that they're trying to sell there? And to what extent should we endorse personal attacks?

JUDGE LASNIK: Let me ask the attorneys who practice in this area. Judges are always trying to get cases to settle and avoid trials. What are the dynamics when you approach the issue of settlement or arbitration of some of these issues that are very different from the other kinds of cases you get?

JOHNSON: The main difference, I think, is uncertainty of the damages. In most cases, particularly most civil and commercial cases, damages can be fairly easily estimated. Particularly in jurisdictions where you have punitive damages this problem increases even more. As a consequence, you have the defendants coming in thinking this is not something that has a big number attached to it, and the plaintiffs coming in and saying this is something which is ultragazillion dollars in damages, and that proves to be a very big hurdle for getting folks to arrive at a satisfactory settlement.

JUDGE LASNIK: Do plaintiffs seek apologies more than money, and can you sometimes avoid a lengthy lawsuit if you just get an apology or a retraction printed?

SHAEFFER: Many times, a retraction is helpful. The media, however, has a lot of issues above and beyond simply this one particular case. They can't be seen as someone who's willing to settle every case that comes to them, and a lot of times they need to have some precedent. In a case like this, if this is a book that's out there, you want to keep this in the public eye because you're going to sell more books. So, it really depends on what the client is seeking. Many times the appropriate retraction is sufficient for most of the people I represent.

BARON: Can I answer that point? For many media, at least the ones I have worked for, worked with, a decision about a given case becomes a matter of principle. It is a principle on two levels. One, if you believe what you reported, and now I am thinking of news organizations perhaps more than a book of fiction, it is very difficult to settle a case. There are many clarifications possible, there are many forms of statements news organizations can make, that separate out what they think may have been at issue or may be the moral of the story. But a simple blanket mea culpa may not be appropriate from their perspective. And journalists take those kinds of issues very seriously. Keep in mind that in a lot of cases there are two sets of reputations at stake, more so I think than in any other kind of civil litigation. There is the plaintiff. But there is also the news organization's or the publisher's reputation with the community for accurate and truthful reporting.

SHAEFFER: In my experience dealing in books or longer term type articles, I think the news media really wants to get it right, so they will sit down with you. If you can show them something is just flat-out wrong it'll be changed and corrected. The problem, many times, is the time isn't there to do it. Deadlines are approaching too quickly.

JOHNSON: There are statutes, for example, that can encourage this process. California has a particularly helpful correction statute which triggers the ability to eliminate punitive damages and certain other damages if there's a prompt retraction by the publisher. The Uniform Correction or Clarification of Defamation Act is a proposed statute which has been passed by one or two jurisdictions so far at the behest of the Uniform Law Commissioners. The act contains a very rigorous system for getting people early on to clarify the record and creates incentives to do so.

COLLINS: There's one thing that this hypothetical points out, and it may begin to change your perspective. A lot of times we think about libel law from the perspective of whether the individual who makes a statement is going to be *sued* by someone. But in this hypothetical, the big concern a writer would have wouldn't be so much John taking him to court as it would be with dealing with the in-house counsel for the publisher. I mean, if you talk to writers, it's not so much the plaintiff's bar we're worried about. A lot of what writers say can't get out there because the defense bar is so concerned and so worried that they won't allow many things to go to print. Sometimes, they simply won't allow writers to publish a book in a robust way. I would think that on the facts given here, the matter would never get to John to commence a lawsuit. It probably would never even go beyond Bruce, or Sandra, because they might well counsel against publication. So from that vantage point, I mean, if you're a writer, you ask, "Who's really—for lack of a better word—censoring? Who's prohibiting me from saying what it is I want to say?" Regrettably, the answer may be the defense lawyers themselves.

SKOVER: Thank you, panelists. Let's move on to our next scenario, The Case Of Orange Outrage. Ultimate Oranges Company, a Florida grower and distributor of oranges, uses pesticides in the production of its crops. A local investigative reporter from KAH-TV does a story on the hazardous side effects of the pesticide on orange growers and pickers. This story relies on a government report that suggests some risk in exposure to the pesticide. Several industry-supported studies, however, categorically refute these findings. On the TV program, a government spokesman who is interviewed states, "It is not known at this time what detrimental effects the use of such pesticides may have on consumers of oranges, but caution is always in order." A flamboyant Hollywood movie star finishes the episode with the comment, "I'll never eat Florida oranges again!" Within days of the report, orange sales in the region plummet. Subsequently, Ultimate Oranges Company sues the reporter and her TV station under the common law of libel and Florida's food disparagement statute. So far as liability is concerned, how do the reporter's statements pertaining to worker's safety differ, if at all, from the statements regarding safety to consumers of oranges?

SHAEFFER: I guess I go first again. First of all, I think I should apologize for the failing of my opening statements. I didn't anticipate the argument that was going to be made about the deck being stacked against the plaintiff. I think this is the perfect example of this. If I simply had a defamation claim with these facts I would lose. I mean,

there's someone expressing an opinion, "I'm never going to eat an orange again," I'm not going to be able to do anything with that. The interesting issue that really is unresolved now is the status of the food disparagement laws which the agricultural producers are using as an end-run around the First Amendment. I can't get them for libel, I'm going to get them for this unique thing called trade disparagement, and that's what has the media scared to death. As was pointed out, you can defame Bill Clinton but you can't defame an orange.

JOHNSON: At the risk of confusing apples and oranges, this bears a close resemblance to the case that I handled several years ago.²³ What was puzzling about it is that in the lawsuit, which involved CBS' *60 Minutes* and the story about alar, is that the case law dealing with product disparagement generally, and even the case law regarding these agricultural disparagement statutes, is remarkably unclear. By contrast, libel law is a very stable body of law, currently. So what we were faced with was a particularly unknown, unexplored territory where the guideposts, both legal and factual, were few. It took six years for that case to be disposed of finally, from filing date in the Yakima County Superior Court to final denial of certiorari in the U.S. Supreme Court. As it turned out, the basic problem was that the plaintiffs could never prove the broadcast was false, in part because scientists disagreed over the ultimate risks of a particular pesticide which had been pulled off the market by its producer. And, ultimately, the lawsuit became a battle of experts, so you can imagine the costs of litigation involving eight experts opining as to what might happen in the next sixty years should alar have remained in our food supply. They were all over the map.

COLLINS: This hypothetical raises two basic concerns. One is worker safety. You know, the people who work with the pesticide. Is it really injurious to their health? Next, there are the people who consume the products that have the pesticide in them. From the vantage point of any cause of action, so far as worker safety is concerned, that's probably a loser case. Criticizing oranges, by contrast, is a different matter. The food-libel statutes as they exist in Florida and elsewhere may allow for a disparagement lawsuit. If you're a reporter or a public interest advocate or whomever, it's not enough to say, "I relied on a government report." You'd think a government report is enough. You can go out and report on it, but not really. For example, has the reporter checked other relevant studies? The response would be, "Well, those are industry studies, they're industry supported," to

23. *Auvil v. CBS 60 Minutes*, 67 F.3d 816 (9th Cir. 1995).

which plaintiff's counsel would reply, "But have you checked them? Have you compared them?"

But our reporter is not a scientist. She must get the information out to the public. So does that mean she can't report about what the government says? Well, you can report it, but you might be liable. Now, I believe such food-label statutes are clearly unconstitutional. Still, the question is: Can one speak out in the face of threatened and costly litigation? Can you afford to win? Can you even afford to fight the fight? I think the chill is just too great. What that means is forced silence.

JUDGE LASNIK: I think you have to look at it from the perspective of an industry that has ways to counteract bad publicity—advertising, press conferences and the like. Why is this an effective way that you can counteract Dan Lewis? Our hypothetical has a regional, local television reporter making the report, and Seattle has regionally focused news reporting. Well, if you file a high-profile lawsuit and end up on national television, now you've distributed that negative information to a much wider audience, and you may see national sales of oranges go down. So in the equation of what is the purpose of the lawsuit—you're not going to get a quick resolution of a lawsuit in this day and age as it goes forward, and you could just generate more bad publicity for your product.

SHAEFFER: Well, you can see the economic perspective coming from the agricultural community. If they see a precipitous drop in sales because of something they don't believe is true, they're looking for a remedy, they're looking to fashion some sort of prevention effect. There is a broad spectrum here. The situation is a little different if you're doing a product comparison. If I'm the maker of Clorox bleach and I decide to say that someone else's bleach is inferior for all of these reasons, that supports a different type of cause of action under the Lanham Act than a reporter making adverse statements about some product. I think everyone in the room should be able to see that there's a problem here, but can you fashion a remedy?

JOHNSON: The British and the French can provide some guidance. Many years ago it was uncovered that there was a risk of Jakob-Kreutzfeld's disease by consuming British meat products. This is a variant on "mad cow" disease, which was the subject of the Oprah story. The British government began taking additional steps to improve the meat supply, and the European Union basically certified British beef products throughout the European Union. The French decided no, this wasn't safe enough for the French, and they were going to outlaw all British meat products. Last month the British

came up with the perfect solution. There was a news article talking about the fact that the French regularly dumped sewage into their chicken feed, and, as a matter of fact, what happened at that time was that French products in Britain began to be the subject of a consumer boycott. They are in the process now of working things out. More speech is sometimes better than less speech when dealing with false speech.

SKOVER: Let us move now to The Case of Little White Lies. George Guy, a middle-level manager at Almus-Chambers, a chemical manufacturing plant in Eu Claire, Wisconsin, contacts his friend, Amy Cary, a reporter at the *La Crosse Daily Journal*, a newspaper serving the Greater Coulee region, including Eu Claire. George tips Amy off to worker safety violations that he suspects are occurring at a consistently increasing rate in his chemical plant. Assuming an alias and representing herself as an industry-experienced professional, Amy is hired as George's secretary and spends three weeks at Almus-Chambers secretly documenting and photographing questionable conditions and events. Leaving her secretarial post, Amy writes a front-page exposé on incidents that the newspaper's legal counsel determines to be unquestionable worker safety violations under state and federal laws.

At that point Almus-Chambers fires George Guy, and sues him, Amy Cary, and the *La Crosse Daily Journal* in the Western Wisconsin federal district court, contending that the defendants perpetrated fraud and trespass in gathering information for the exposé. Assuming, arguendo, that there were violations of state common law, the defendants raise, by a summary judgment motion, a First Amendment defense to any such state law prohibitions. The defendants invoke the U.S. Fourth Circuit Court of Appeals' recent ruling in the *Food Lion* case, a lawsuit that the media attorney Floyd Abrams called "an attempted end run around the First Amendment." Assuming that there is ample evidence to support a jury finding of state common law fraud and trespass, should the press be immunized from such liability under the First Amendment's protection of newsgathering privileges? Should journalists be allowed to tell small lies in order to report large private corporate wrongs?

SHAEFFER: For me this raises the point I made in my opening statement, that the public likes to hear the ultimate story. They don't like the fact that reporters will lie, cheat, and steal to get to the story. Libel is not a good vehicle for pursuing this kind of case. What was curious about this case is that they threw in all these common law torts in an effort to, as Abrams said, make an end run around the First

Amendment. What the issue comes down to is, should reporters be treated differently than anyone else with respect to common tort liability?

BARON: I think the First Amendment bar is struggling probably more today on this question of the relationship of the First Amendment to these common law torts than at any time in my experience in the practice of media law. Bruce mentioned *Cohen v. Cowles*. *Cohen* is certainly the simple answer that a lot of plaintiffs' counsels, and, I would suggest to you, not very thoughtful judges, have applied in these instances. But they do so without reading the majority opinion in *Cohen* very carefully to see all that Justice White had to say there about how these laws of general applicability can be applied to the press, provided that they only had incidental effects on news gathering.

In addition, the decision contains as a not unimportant caveat the fact that the plaintiff was not trying to obtain reputational harm damages. This point is being picked up by the courts, which are consistently holding that reputational damages will not be allowed in these cases. The word "doctrinal" is one I have always found difficult to get out, but perhaps it applies in this instance. The doctrinal approach of applying the First Amendment to these claims, I think, is something that is very much a work in progress right now.

JOHNSON: One of the interesting things about the *Food Lion* decision is that the jury awarded \$5.5 million to the plaintiff, a large grocery chain in that particular case, and the Fourth Circuit reduced that to two dollars. Now, consider the significance to the media when the jury basically treats a two dollars claim as a \$5.5 million claim, the risk it presents to the press. But you should also think about the incentive structure built into this type of litigation in the future. Will the plaintiff's lawyer really want to take a case where the contingency fee is sixty cents?

SHAEFFER: Well, in an instance like this, you know, representing a major corporation probably would not be on a contingency fee basis. The interesting point that we were discussing beforehand is, if I was bringing this type of a case, I may only sue for trespass and common law torts without any libel claim, and attempt to keep out of evidence the truth or veracity of what was actually said in the story. So, keep the presentation of all the doctored meats and all the horrible things that have actually been done in my market and say, well, see, they just trespassed, so I should get an award.

JUDGE LASNIK: I think—don't overlook John's point about the—it's not a contingency fee case. This is not an injury suffered by

an injured party case as much as it is a corporate entity attempting to fight for its corporate life, the same way it would in a commercial venture, and, therefore, it would use a combination of probably in-house counsel and corporate counsel with premium experts on how to make end runs around the First Amendment. And I think that—I've not had to deal with this on the bench, and of course each case has its own kind of facts, but I think we as panelists can imagine general—the laws of general applicability that we don't want the media to violate, and we can imagine those that we do, and again go back to a civil disobedience sense. If the only way to really cover the story is to go to where the migrant workers live, which happens to be on the grower's ground, to get the story, that's going to be looked at differently than a situation where the only reason you sneaked the hidden camera in there was not really to gather news, but because you're a television show and you have to have something visual, and so that's justification for using the camera.

BARON: I think there is an interesting tension that is going to go on in this litigation as it goes forward. There is the corporate desire, and this is generally corporations, large entities bringing this litigation—corporate desire not so much to get damages from the press anymore, because that does not seem to be terribly likely in these cases, but simply to stop them from reporting in this manner. You are not going to come into my plant and show that I abuse my workers or whatever it is that the press is seeking to uncover and expose. The way I am going to stop you is by bringing this kind of litigation. Eventually, the press will back off. They won't do undercover reporting anymore. Compare this to the other reality that a corporation has to face, which is that any litigation keeps the subject of the undercover reporting in the public eye for the life of the litigation. It's all well and good to say it is only going to bring trespass and fraud claims, and by doing so prevent the jury from seeing the actual new report, which showed something about the company in a bad light. But the fact is, that is going to be publicized, and by bringing this kind of claim, Food Lion—to use a real life example—stayed in the public eye for years and years after the 20/20 piece publicized the fact that Food Lion would sell chicken after its original sell date had expired. So, I think there's going to be this very interesting back and forth within corporate headquarters between these two results that may be mutually inconsistent.

COLLINS: It's hard to make a free speech defense when the First Amendment is not part of the equation, when just the law of torts governs. Even with the common law and all its protections, there has

to be a certain First Amendment sensitivity as you apply common law doctrine to a situation. In a sense, you can never exclude the First Amendment simply because a particular cause of action has not been pleaded to the court.

SHAEFFER: Obviously, this entity is not suing because someone trespassed on their store. They're suing for damage to their reputation. They are suing because they're trying to vindicate their reputation, albeit in kind of a ridiculous way, since they kept the story in the press for a long time. That may be a new way for the courts to really look at this. Is the ultimate remedy sought reputation, even if that's not for the award, and I think that's where the First Amendment sensitivity needs to come in. And, as it was said, we can all probably come up with torts in this type of instance where there is a need for relief other than rehabilitation of reputation.

JOHNSON: Well, there's an interesting print versus broadcast dilemma underlying this particular hypothetical. Historically, the news media have reported information provided to them by corporate insiders about such things as tainted food, bad meat, and the like. The print media will still report those facts without too much fear of liability. The problem comes when the electronic media attempt to corroborate that information, to provide the visual evidence that basically establishes once and for all that the problem is there. For some odd reason, the courts are creating a different rule of law, potentially, for the electronic media for disclosing the same information that could be disclosed with virtual impunity in a newspaper.

I find that a very troubling distinction, but it's a product of the technology and of courts' uncertainty about the risks associated with publicizing truthful information that broadly, that effectively, to members of the public. And yet from the standpoint of the media, to quote a recent Second Circuit case, video and other visual guidance "can provide unimpeachably objective evidence . . . this type of to support the points being made."²⁴

SKOVER: Thank you, panelists. Our last scenario for discussion today is *The Case of the Cyberspace Public Figure*. In contemporary constitutional law, the mass media are far less likely to be found liable for defamation if they focus on public figures rather than private ones. As you know, the "public figure" concept is tied to two premises. First, average citizens typically have more limited access to the mass media than public figures to combat false or misleading statements. Second, individuals who thrust themselves into the common domain must expect their names to be bandied about with greater frequency

24. *Gonzales v. NBC, Inc.*, 194 F.3d 29, 36 (2d Cir. 1999).

and with greater error. Based on these two premises, is the traditional division between public and private figures likely to be as sharp in cyberspace? Take the case of a conservative moralist who launches a website called *Family Values*, that publishes his personal articles and provides RealAudio recordings of his personal essays on the decline of Judeo-Christian marital and family relationships. The website catches the attention and imagination of the fundamentalist right, and after a year of operation, has become relatively renowned, receiving some one thousand hits a day. Subsequently, the moralist is falsely accused of marital infidelity by the editor of an electronic column, *Net Gossip*, that is the liberal counterpart to the *Drudge Report*. Should the conservative moralist sue the editor of *Net Gossip*, is he entitled any longer to the law's protections for private figures?

BARON: No. That to me seems pretty straightforward and fairly simple. It seems to me that someone who takes the initiative and inserts himself or herself, or itself in the case of an entity, into a controversial realm as this gentleman has done, and has the ability to respond, indeed, one could say he picked the fight, is unlikely to be found to be a private figure. Correctly, I think he would be found to be a public figure.

SHAEFFER: I would look at it just a little bit different. I think the one thing the Internet has done is really reduce the barriers by which an individual can respond. I think the key fact here is that this person has a presence on the Internet and, therefore, has the ability on the Internet to respond to the Internet community. I think you would be drawing a sharp distinction if the story was picked up in the *New York Times* and published to everyone as to whether or not he is a public figure in a media beyond the Internet, and that's a distinction I'm not aware that any case has drawn.

JOHNSON: What's interesting is that I think Andy Warhol's comment can be paraphrased, "In the future everyone will be a public figure in 15 minutes with the Internet." I said that all of us are reporters on the Internet, all of us will probably also become public figures on the Internet. What's interesting to see in the next ten to twenty years is whether the law responds to this different dynamic, in that the prototypical case is no longer the large media entity, with significant financial resources and the ability to speak loudly and clearly across the nation, versus a single plaintiff who has no access to the media to get his or her reputation corrected. We may find a leveling of the playing field and therefore a different paradigm with regard to libel law within twenty to thirty years, which I find to be a very interesting development.

COLLINS: If you're a public figure in cyberspace, in a cyberspace publication, are you perforce a public figure in print publications? For example, let's say that this whole scenario was covered by the *Los Angeles Times Online*. Now if the *Los Angeles Times Online* took that same story and printed it in its print edition, same situation, do we still have a public figure? Can we assume that because one is a public figure in cyberspace that he or she will be perforce be a public figure outside that realm? Such questions are certainly ones that are likely to arise in many cases of libel.

BARON: It has been interesting to me that, considering the enormity now of the amount of speech, just the sheer volume of speech on the Internet, that there really has been relatively little libel or invasion of privacy litigation. It is coming. We see it, follow it. We're watching it build. Much of the early litigation in the Internet has been in trademark law, copyright law, intellectual property, and not in libel and privacy. But I was also quite astonished to realize when teaching a class of journalism students no more than a year ago how few of them realized that the basic laws of libel and invasion of privacy apply not only to our conservative evangelistic, with his well-known and frequently-hit Internet site, but to their e-mail. To your e-mail. Back and forth. That libel law does not require much in the way of publication. One person is sufficient. And I think as people begin to realize that the fundamental laws of libel and privacy in fact apply to this new media, you are going to see a great deal more litigation raising some of the more esoteric issues that we are discussing, such as who is a public figure, who is a private figure. You know, it is going to be worked out, but it is going to be worked out, I think, with a lot of very ordinary human beings in the litigation, unlike so much of the big media litigation which involves big entities on both sides.

SHAEFFER: The one last point that was made, and it does raise another spectrum as was just mentioned, is the advance in intellectual property law in terms of cross-border implications of being able to bring suits anywhere. I think libel may hit the same level that when you publish something on the Internet, are you publishing it all over the world with respect to libel?

JOHNSON: Here is another interesting issue that is implied, I think, in some of Sandy's comments, and that is the issue of what happens if libel law is extended to virtually everything on the Internet. Which it is, legally speaking. But we have been talking to the last thirty-five years in this country about a regime of constitutional law applicable to defamation, which turns upon a four letter—excuse me, four word statement, “matter of public concern.” In 1964 *New York*

Times v. Sullivan created a new constitutional rule where the press dealt with matters of public concern involving a public official, and, thereafter, a public figure. Even *Gertz*,²⁵ that 1974 U.S. Supreme Court case dealing with private individuals, stated a rule that at least required negligence on the part of the media before liability could be imposed involving a statement on a matter of public concern involving a private individual.

What happens when the Internet and email start generating things which, clearly, no court would look at as matters of public concern but is simply gossip? At that point, we may find ourselves relying on the rules of the British common law and the old days of presumed damages, strict liability, and a system of freedom of speech and freedom of the press that people would find astonishing, if in fact that is the way things go.

COLLINS: Bruce, one answer to the question of what will happen to matters of public concern, one of the things that could happen is our whole notion of such matters could change. In other words, matters of public concern may cease to be limited to political matters. Matters of entertainment may well become matters of public concern. We suggested so much in our book, *The Death of Discourse*.²⁶

JOHNSON: There's a case pending in the New York Court of Appeals right now²⁷ which deals with a related issue, the *Chapadeau*²⁸ gross irresponsibility standard enunciated in New York, but it turns upon whether a media publication dealing with Hollywood stars' divorce or entertainment figures' divorce proceedings—

BARON: She argues that the divorce implicated the question whether black women are faring poorly under divorce laws.

JOHNSON: And the trial court, I think, or actually it'd be appellate division, said that that's not really a matter of public concern, that's simply a divorce. So there are some cracks in the system and it's important to watch the developments as we move forward.

SKOVER: I find something potentially troubling about the comments that you have been making, and I would like to follow up on this. Starting with Sandy's categorical answer that this person would be a public figure, does it not follow that the more "Net" public figures we have, the less "Net" libel we are likely to have? And then there is the distinction between a public figure on the "Net" versus a public figure in the traditional press. Is it not unseemly that we could

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

26. See *supra* note 10.

27. See *Huggins v. Moore*, 726 N.E.2d 456 (N.Y. 1999).

28. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196 (1975).

have the *New York Times Online* law of libel versus the *New York Times* print law of libel with respect to this gentleman in the scenario? Are we going to develop two different bodies of law in libel, depending on the media involved?

BARON: I don't want to be too categorical about my answer to that. I think the reason this case is easy, in a sense, is that inserting one's self into a controversy of the day, which this gentleman has done, is generally one of the criteria for a public figure. I think that is going to translate from the web to the newspaper, and if an issue is of sufficient energy and controversy that it migrates from a website to the *New York Times Online* to the *New York Times* in print, I think the analysis is going to hold up. I think it's because it has generated sufficient heat and weight that he's going to be a public figure up and down the line.

I do think, however, eventually in some of these cases that are coming up, that the issues are so slight that only on the Internet are people getting exercised about it, and you may find a new body of law that says, it does distinguish that one can be a public figure for purposes of controversy that is uniquely interesting on the Internet but, really, has not the same kind of juice when you get out into the community at large. I think it's possible.

SHAEFFER: From a more practical perspective, the way I see the law evolving is—and this is my own personal opinion—is that everything has become an issue of public concern. I can't think of anything right now that isn't an issue of public concern. So virtually everyone, as we just pointed out, is going to be a public figure.

JUDGE LASNIK: Can you really defame someone on the Internet who's Internet tag is "NastyAss45?"

BARON: There is the international aspect of this. Amazon.com, for example, is in litigation right now in England over a book about Northern Ireland that was offered on Amazon.com.UK as well as Amazon.com.US. I believe Amazon.com.UK for a brief period pulled the book off of its lists a result of the litigation.

There is a scientist in England who has taken to suing everyone. I mean, he provokes fights and when people respond with critical things about him, he sues them. And he sued, in fact, a student at Cornell University, as well as, I think, at the University of Minnesota. I don't remember all of the people he has sued, but he has sued people all over the world. The U.K. courts took jurisdiction. Query how all of this internationalization of communication and literary commerce is going to affect the law of libel. And I know Bruce has views on this, so I'll give him the softball.

JOHNSON: There's another interesting Amazon.com story, and that is that Amazon.com is in trouble or got in trouble in Germany because there's a law against selling *Mein Kampf*. And you can purchase it on Amazon.com even if you are accessing it from Germany. So, for a while Amazon.com tried to figure out how to sell *Mein Kampf* to various people without running afoul of German law, and it is impossible really to conduct business on the Internet on a jurisdiction by jurisdiction basis.

So we may find ourselves with the least common denominator. One of the areas of Internet liability which I think is worth touching upon is privacy law. We've seen in the last several weeks some lawsuits against Real Networks, another Seattle company, arising out of alleged invasions of privacy dealing with the use of data compiled through click-throughs by customers. I think that this is one of the areas where you are really going to see major litigation on the Internet. Not so much defamation, since we will all be public figures for fifteen minutes, but really privacy. There are discussions going on right now between the European Union and the United States over the extent to which the European Union's Data Directive, which prohibits the collection of certain information about individuals, will be enforced or enforceable against American companies. The consequence of failing to achieve an agreement will be a trade war, so I fully expect to see an agreement within the next few months. But you may see European attitudes toward privacy being imposed on American companies. Anyone who has seen Jennicam²⁹ knows that Americans have a slightly different attitude toward privacy than Europeans. Perhaps because we have to pay our way through college, and therefore having jennicam.com may be a useful way to do it. But we will find ourselves dealing with very different issues of privacy than what we're used to in the area of libel, and I fully expect to see the privacy issue being litigated rather thoroughly in the next several years.

COLLINS: You tend to think of the Internet as exporting First Amendment values for the whole world, as if somehow the whole world will accept our First Amendment perspective on life. And yet from the comments we have heard today, it could work just the other way. In other words, we could be importing the common law and statutory law of other countries. That could be the case, at least in terms of the policy decisions that Internet service providers make as to what they will or will not allow to appear on their websites.

SHAEFFER: I want to make the point, one thing that you hear interesting on this panel is the number of different people who repre-

29. See <<http://www.jennicam.org>>.

sent media companies. And putting on my other hat, an intellectual property practice hat, that area has developed much more vigorously in the international arena. We have the Berne Convention, we have a number of conventions and treaties that are attempting to create an international view of copyright protection and trademark protection that'll be recognized throughout the world. I think that maybe a fruitful area in the near future will try to develop international libel laws, notions of speech and protection of speech, which to me are almost synonymous with notions of intellectual property, similarly protected by the national treaty.

JOHNSON: Every practicing lawyer has a law review article that he or she wishes he could someday sit down and write. Mine has always been an article which would argue that *New York Times v. Sullivan* flowed directly from a 1946 U.S. Supreme Court case, *International Shoe v. State of Washington*.³⁰

In the 19th century we had contests of jurisdiction which were very geographically limited. And the *New York Times* could not be found in the state of Alabama to be sued under *Pennoyer v. Neff*.³¹ But under the long arm statute in *International Shoe v. the State of Washington*, even with only 13 or so copies of the *New York Times* available in Alabama, even with a policy by the *New York Times* not to allow any correspondent to go within the state, the State of Alabama was able to assert jurisdiction over this New York institution.

It does call to mind the "house divided" speech of 1860 by Abraham Lincoln, that once we became a union we actually had to one degree or another to develop a case law which would be applicable to all of us. And with *International Shoe* the peculiarities of Alabama law or of Alabama views about civil rights became national problems. I fully expect to see the same principle apply, either for good or for ill, in the international arena in the next thirty years.

SKOVER: Thank you. With that last eloquent and totalizing comment that brings your first year of law school back to you, this portion of our program, the roundtable discussion, will end. But before we begin questions from the audience, give a healthy round of applause to this panel. Thank you. Please come up to the microphones to ask your questions.

QUESTION: My name's Pat, and I'm a retired attorney. I'm a friend of Bruce's, and we like to compete with how far we can push the clock back. I have a statement first and then a question. Bruce pushed his inspiration back twenty-five years. I want to go back 240

30. *International Shoe v. Washington*, 326 U.S. 310 (1945).

31. 95 U.S. 714 (1877).

years, when a young reporter wrote an article that said, among other things, that the British Governor of Massachusetts had bad breath, and the young attorney, Andrew Hamilton, argued to the jury it was true. And the judge instructed the jury that truth is no defense to libel, and that was the law at the time. And the real heroes in the case were the American jury who said this is nonsense and acquitted the defendant, who was Peter.

JOHNSON: Peter. An early affluent in New York of jury nullification.

QUESTION: Yeah. But there's where I get my inspiration. Now my question. I miss Senator Proxmire and I miss the Golden Fleece. Proxmire used to award a golden fleece to people who had government grants and did silly things with them, or at least he thought they did silly things with them, you know, like go to Hawaii and look at snails or something, eat them or whatever. And he stopped doing it long before he stopped being a senator. The reason was that these people getting government money were usually private figures. You know, just some guy in a university. It always seemed to me that the law of libel was a little bit over-broad and that we ought to at least look at what private people do with public money when you give it, and maybe you don't make your inquiry go any further, sort of like what you're talking about on the Internet. Certainly, it's in the public interest to know what people are doing with the grant money, and some of it's quite considerable, and the public figure law ought to apply at least in that narrow space, not go any further. So my question is, if we could write down the law of libel with all its ambiguities and its future developments and call it a statute, would it meet Supreme Court requirements for narrowness? Seeing as it can be over-broad and vague, and has anyone raised this question?

BARON: Well, among the various doctrines in libel, the question of who is a public figure and who is not, I think, is one of the messiest and murkiest. There are cases, by the way—I'm not sure I can cite a few right now—where people who are participating in public projects, an architect hired to design public buildings, a psychologist hired to review the case of a particular child for a custody dispute, have been held to be at least a public official, if not a public figure. But to answer your question, the Supreme Court has tried to identify what it thinks are the restrictions the First Amendment imposes on libel law. If one were to craft a libel law that in practice exceeded that, that is, that allowed public figure qualifications to apply beyond what the Supreme Court has indicated are sort of the limits the First Amendment? I think the Court would say it is fine, you are allowed to go

beyond the First Amendment in terms of affording protection to the news media. You are just not allowed to go in the other direction. So if you wanted to declare anyone who gets public money to be a public official or public figure, I don't think the Supreme Court would have an objection.

SHAEFFER: Unless, of course, you could make some argument that it ran afoul of some other constitutional protection.

QUESTION: I have another question. It seems to me that the First Amendment is so American that it is practically an ingredient in apple pie, and one of the big issues that has come in here several times is the effect of international litigation on First Amendment values and First Amendment rights. The First Amendment must have, in addition to its normative justifications, it must have instrumental justifications—some effect it produces in United States that we value that is not produced in another country with a vibrant political culture, like France, or England, or Germany. I would like to know what you believe that effect is, what do we have as a result of the First Amendment that they do not have because they don't have a First Amendment?

JOHNSON: Let me hazard a guess. I think clearly they're a free society as we're a free society, and a broad definition of freedom would encompass what is available in Britain, Germany, and France, and in newly developing countries in Eastern Europe, Japan, Korea, plus the United States and other countries around the world. What is unique about this country is the freedom of association, as Alexis de Toqueville observed in 1835 when he visited Jacksonian America. Americans formed associations for virtually everything. The nonprofit sector is what I'm speaking of to a large degree. People volunteer here. They do so in numbers seen in few other countries. I've had visitors come to the States and be astonished at the amount of volunteer time that goes into projects here in Seattle, people who devote their resources to volunteering. You simply don't have that voluntary sector, for one reason or another, in many other societies. Perhaps because American capitalism is as strenuously capitalistic as it is, that voluntary sector is very important to the health of our society. And I think this sector really does depend upon ample First Amendment protections in order to survive.

SHAEFFER: To bring this back to libel law, I think it would come down to, and I don't know how you would prove this, the bitterness of the debate. When the Bill Clinton-Monica Lewinsky affair was going on you always heard everyone in Europe saying, well, this would never be such a media event in Europe. So yeah, people are

subject to, I think, public officials in the United States are subject to a degree of scrutiny that they may not be subject to overseas. Is that a good thing? We tend to think it is. It may not be.

BARON: There is also the question of opinion. Americans in this case are given the right to express a lot of opinion. Some of them positive, some of them angry. If you look at European law, you will see that there is a lot of legislation and case law that really puts the lid on opinion. I think Americans would find it very difficult, quite honestly, to accept some of the cultural norms of European and Asian culture. I agree with you. I think it is an interesting question that some scholars should take up. What specifically are the differences between us and them in terms of our press, and in the bigger examination of public figures and public officials, our ability to express the vehemence of our views?

COLLINS: In all of this it is well to remember two points. Our constitutional protections are the First Amendment and its state constitutional counterparts. State constitutions can be used to give a greater level of constitutional protection. So obviously, the First Amendment is just a federalist floor in our federalist society—it is the first of several tiers of protection.

My second point concerns the language of the First Amendment. It is the making of the law that is problematic. Insofar as the First Amendment counsels against the making of laws abridging speech, it perforce attempts to prevent litigation. It's supposed to come into play at the very level of the lawmaking process. Given that, I wonder what sort of institutional checks we might one day have to somehow bring the First Amendment into the lawmaking process, at the very first instance where the first threat occurs. What could we do institutionally in the legislative process itself to begin to protect free speech values such that they don't have to be litigated after the fact? Maybe it's a bad claim, but permit me to launch it nonetheless: free speech is above the law of lawmakers—that, at least, is the great premise of our First Amendment.