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REMEDIES, NEUTRAL RULES AND FREE SPEECH

David F. Partlett[*] *and Russell L. Weaver*[**]

I. INTRODUCTION

New York Times v. Sullivan[1] has avid fans, passionate supporters, and a few critics.[2] No matter the passion or the criticism, *Sullivan* has endured and has assumed global significance by encouraging foreign courts to re-examine their defamation jurisprudence.[3] But *Sullivan* has tended to cause us to look at the First Amendment through a narrow lens. We have cheered the idea of robust speech and the shedding of the shackles of defamation law, and embraced the Court's decisions restricting press licensing provisions[4] and prior restraints.[5] But, in the process, we have allowed courts and legislatures to hollow or emasculate the press through other doctrines.

II. EXAMINING THE PRESS' SPECIAL LEGAL PROTECTIONS

For decades, courts and commentators have debated whether the First Amendment provides the press with special protections.[6] In

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1. 376 U.S. 254 (1964).

2. *See* Russell L. Weaver & Geoffrey J.G. Bennett, *Is the New York Times Actual Malice Standard Really Necessary: A Comparative Perspective*, 53 LA. L. REV. 1153 (1993).

3. *See* RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT & CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION & FREE SPEECH (Carolina Press 2006).

4. *See*, *e.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938).

5. *See*, *e.g.*, Near v. State of Minn., 283 U.S. 697 (1931); N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

6. *See*, *e.g.*, Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people."); Potter Stewart, *Or of the Press,* 26 HASTINGS L.J. 631, 633 (1975) ("[T]he Free Press Clause extends protection to an institution. The

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general, the Court has provided little protection for the newsgathering process. In *Zurcher v. Stanford Daily*,[7] the United States Supreme Court refused to protect the press against police searches of their newsroom. In that case, four police officers searched a paper's file cabinets, wastepaper baskets, desks and photographic laboratories for evidence related to a crime. Likewise, in *Branzburg v. Hayes,*[8] the Court held that the press did not have the right to preserve the confidentiality of its sources against governmental inquiry. Although the *Branzburg* decision was a narrow one,[9] the issues presented by that case have not disappeared. In recent months, *New York Times* reporter Judith Miller spent weeks in jail for refusal to reveal a source, and Matthew Cooper was threatened with jail time prior to Miller's incarceration.[10] In the Miller/Cooper cases, the courts again rejected recognizing any special privilege resting in the press.

Other cases revolve around the question of whether the press has an elevated status in gathering news. These cases involve the well-known principle invoked by *Branzburg* that the press enjoys no special privilege or defense.[11] Thus, the press has no elevated right to breach a contract, betray a confidence, trespass on land, or invade privacy in the name of getting out the news. These cases are usually lumped with others that blandly declare that a neutral rule of law does not usurp First Amendment free speech. The courts are sensitive about rules that would punish the publication itself or that examine its context.[12] Although the interest of physical integrity is weighed heavily in the balance, free speech protections are outweighed only where the danger is highly likely and the publication serves little public utility.[13]

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publishing business is, in short, the only organized private business that is given explicit constitutional protection."). *But see* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring). The *First Nat'l Bank* Court stated:

> The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others . . . . Although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege.

Id.

7. 436 U.S. 547 (1978).

8. 408 U.S. 665, 685 (1972).

9. Stewart, *supra* note 6, at 633.

10. *In re* Special Counsel Investigation, 338 F. Supp. 2d 16 (D.D.C. 2004). Interestingly enough, the source eventually authorized Ms. Miller to reveal his name. Afterwards, the source, Vice-Presidential aide Louis "Scooter" Libby, was indicted for perjury. *Id.*

11. *See First Nat'l Bank of Boston*, 435 U.S. at 798 (Burger, J., concurring).

12. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

13. *See* Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989); Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992); Norwood v. Soldier of Fortune, Inc.,

The cases that concern the press in newsgathering should be disaggregated. Some, like *Cohen v. Cowles Media Co.*[14] are easily justified under the First Amendment. In *Cohen*, the Court found that the defendant who discloses confidential information can be found liable in promissory estoppel. The court's finding was protective of free speech. Without an assurance of confidentiality, sources would be reluctant to divulge information essential to public debate. This is not to say that public policy may, on occasion, require the disclosure.[15] For the press to be able to ignore confidentiality understandings would be destructive of the free press. In the same way, in *Ruzicka v. Conde Nast Publications, Inc.*,[16] Glamour Magazine published an article about therapist-patient sexual abuse.[17] Plaintiff gave information to the story's author on condition that she not be identified or identifiable. The story as published changed her name but supplied details that would allow a recipient to identify her.[18] In contrast to *Cohen* where the damages were for the loss of employment, the loss to Ruzicka was more in terms of her reputation. If the story was republished, could she have recovered those "publication" damages?

Other cases like *Food Lion*[19] and *Sanders v. American Broadcasting Companies, Inc.,*[20] can be said to fall to neutral rules, but their outcomes will necessarily stem the flow of information to the public. To find trespass liability in *Food Lion* will cool the undercover reporter. Likewise in the *Sanders* case, the press must give consideration to the privacy expectations of the subject of reporting. In *Food Lion*, the First Amendment was the primary reason the court rejected most of Food Lion's claims[21] and refused to give publication

651 F. Supp. 1397 (W.D. Ark. 1987). *Cf.* Rice v. Paladin Enters., 128 F.3d 233 (4th Cir. 1997) (addressing liability for advice on committing a murder); Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802 (S.D. Tex. 1983); Sanders v. Acclaim Ent., 188 F. Supp. 2d 1264 (D. Colo. 2002) (discussing how games and videos incite crimes similar to those that took place at Columbine High School in Colorado in 1999).

14. 501 U.S. 663 (1991).

15. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343-344 (Cal. 1976).

16. 999 F.2d 1319 (8th Cir. 1993).

17. *Id.* at 1320.

18. *Id.*

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

20. 978 P.2d 67 (Cal. 1999).

21. For example, the Fourth Circuit rejected Food Lion's fraud claims. *Food Lion*, 194 F.3d at 524. Food Lion claimed that it incurred "administrative costs" in screening applications, interviewing, completing forms, and entering data into the payroll system for the two bogus employees. *Id.* at 513. Food Lion claimed that it believed that the two new "employees" would work longer than a couple of weeks, and that these costs totaled $1,944.62. *Id.* at 512. The court rejected the claim noting that the jobs were high turnover jobs and that the two reporters "did not

damages.[22] This renders the plaintiff's success essentially nugatory. In *Sanders v. American Broadcasting Cos., Inc.*,[23] the court describes a zone of privacy but would nevertheless give weight to the First Amendment by examining the newsworthy dimension of the information. Nevertheless, on remand, Sanders was able to obtain a judgment of $600,000.[24] The court flatly rejected the argument that Sanders was precluded from obtaining "publication damages" noting that the airing of the intrusion increased Sanders damages.[25] In *Bartnicki v. Vopper*,[26] the Court by a majority found that tapes that had originally been obtained in violation of federal and state law could be broadcast without violating plaintiff's privacy rights.[27] The newsworthiness of the tapes carried the day.[28]

make any express representations about how long they would work." *Id.* at 524. In addition, the court noted that both employees were "at will" employees who were subject to dismissal at any time. *Id*. at 514.

The Fourth Circuit also rejected Food Lion's first breach of loyalty claim which alleged that Food Lion did not "receive adequate services for the wages it paid" the two reporters. *Id.* The court found that the reporters performed quite competently during their period of employment, were paid because they showed up for work and performed their assigned tasks as Food Lion employees, and that "[t]heir performance was at a level suitable to their status as new, entry-level employees." *Id*. Indeed, shortly before Dale quit, her supervisor said she would "make a good meat wrapper." *Id*. When Barnett quit, her supervisor recommended that she be rehired if she sought reemployment with Food Lion in the future. *Id*. "In sum, Dale and Barnett were not paid their wages because of misrepresentations on their job applications. Food Lion therefore cannot assert wage payment to satisfy the injurious reliance element of fraud." *Id*.

22. In its claim for such damages, Food Lion claimed that it suffered reputational damage, as well as loss of good will and lost sales. *Id.* at 523. The trial court rejected the claim for publication damages noting that the damages "were the direct result of diminished consumer confidence in the store" and that "it was [Food Lion's] food handling practices themselves—not the method by which they were recorded or published— which caused the loss of consumer confidence." *Id.* at 522 (*citing* Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 963 (M.D.N.C.1997)). The court therefore concluded that the publication damages were not proximately caused by the non-reputational torts committed by ABC's employees. *Food Lion*, 194 F.3d at 522.

23. 978 P.2d 67.

24. Sanders v. Am. Broad. Cos., No. B094245 (Cal. Ct. App. Dec. 15, 1999), 1999 WL 1458129.

25. The court stated that:

> We reject defendants' claim that the damages were excessive because they included broadcast damages for a non-broadcast tort. The argument assumes that it is only the wrongful intrusion, not the broadcast, that causes damage. Here, however, the damages from the intrusion were increased by the fact that the intrusion was broadcast.

Id. at 3 (citing Dietemann v. Time, Inc. 449 F.2d 245, 249-250 (9th Cir.1971)). "Although the Supreme Court did not reach this issue, it noted that *Dietemann* had rejected the claim." *Id.* (citing Shulman v. Group W Productions, Inc., 955 P.2d 469, 495-96 n.18 (1998)).

26. 532 U.S. 514 (2001).

27. *Id.* at 535.

28. *See* RODNEY SMOLLA, SUING THE PRESS (Oxford Univ. Press 1986).

III. THE PROPER DAMAGE CALCULATION

"Newsworthiness" is the elusive concept that protects the First Amendment value. The concept of "newsworthiness" has a long history. It is one that gives little comfort in cabining the privacy tort and giving courts guidance in balancing the interests in conflict. Our suggestion is to take an approach that follows *Food Lion*. The remedy provided may recognize the plaintiff's property rights but modulate the damages to weigh free speech concerns. This approach is similar to the one used in cases like *Gertz*[29] and *Dun & Bradstreet,*[30] defamation cases involving private individuals. This is effectively what happened in *Food Lion* because the court refused to award publication damages.

Sullivan, as critics have properly argued, was tunnel-visioned. Prior to that decision, the remedy of damages often swelled by punitive damages, was still a pot of gold at the end of hard litigation. Perhaps the goal of reform would have been better served by allowing a vindication of reputation but reducing the expected damages. John Fleming suggested this about twenty-five years ago.[31] To modulate punishment has been long recognized in the law. Recall the old case of *Regina v. Dudley & Stephens*[32] – the cabin boy who was murdered and feasted on by his fellow lifeboat castaways. The court convicted the accused of murder but gave a life sentence that was later commuted to a matter of months. In that way, the right was vindicated but the utilitarian exigencies were recognized in the ultimate result. The cries for reform in defamation have faded. Sometimes they have foundered on constitutional rocks, but, more often, they have not been taken up enthusiastically by the press.[33]

Similarly, with privacy invasions, we suggest that the damages awarded could be carefully tailored. For example, if the "hat cam" footage in *Sanders* is broadcast, the beginning inquiry is to ask what damage has been caused. If business is being run in a fraudulent fashion the assumption would be that the business would soon be found out. In any event, even if the business' reputation is damaged, that reputation is

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

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

31. John G. Fleming, *Retraction and Reply: Alternative Remedies for Defamation*, 12 U. BRIT. COLUM. L. REV. 15 (1978). *See* Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988); SMOLLA, *supra* note 25.

32. [1884] 14 Q.B.D. 273.

33. *C.f.*, THE UNIF. CORRECTION OR CLARIFICATION OF DEFAMATION ACT (1993). *See also* THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR REFORM OF LIBEL LAW (1988); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

simply being brought down to the proper level. But we concede that *Dietemann*[34] allows enhanced damages for subsequent publication.

Likewise, emotional distress damages may flow from invasion of privacy.[35] Recall that an element of the intrusion and revelation of private information torts is "offensiveness." The formulation of the tort fuels the scope of the damages. But their extent should be limited where the information is of a kind that should be revealed for the public good. Unfortunately, little attempt has been made to carefully articulate privacy damages in this manner. There is a need to make sure that privacy damages are assessed to vindicate the privacy interest, but at a level that prevents prevent privacy actions from becoming substitute libel actions free of the strictures of *New York Times v. Sullivan*. This, it will be recalled, was the firm message of the *Falwell* case,[36] deciding that the tort of intentional infliction of emotional distress was not sufficiently sensitive to the requirements of *Sullivan*. Since Falwell was a public figure, it was necessary for him to jump through the *Sullivan* actual malice hoop.

IV. CONCLUSION

In sum, as it has become difficult for defamation plaintiffs to recover large damage judgments on defamation theories, litigants have tended to shift the litigation to non-reputational theories. Included within the panoply of suits are actions for fraud, promissory estoppel, trespass, breach of loyalty, and invasion of privacy (of the intrusion sort). Litigants have had some success with these alternative approaches in the sense that they have been able to obtain judgments against media outlets for their reporting. In a couple of the cases, in particular *Cohen* and *Sanders*, plaintiffs were able to obtain substantial damages.

In general, plaintiffs' ability to obtain substantial damages against media defendants is directly proportional to their ability to obtain so-called "publication damages." In *Food Lion*, because plaintiff was denied "publication damages," it received only a trivial recovery – plaintiff's trial judgment was lowered from $1,400 compensatory damages and $5.5 million in punitive damages to only $2. Very substantial damages were obtained in *Cohen* and *Sanders* ($200,000 and $600,000, respectively) because plaintiffs were allowed to recover

34. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

35. *See* Cheatham v. Pohl, 789 N.E.2d 467 (Ind. 2003) (determining damages at $100,000 for invasion of privacy where former husband distributed nude photographs of his former wife).

36. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

publication damages.

In future cases, the courts may be forced to deal more straightforwardly with the First Amendment issues. In *Sanders*, the court avoided those issues because they were not raised. As a result, the court left open the possibility that, even in an intrusion case a media defendant might be allowed to show that the invasion of privacy was "justified by the legitimate motive of gathering the news."[37] These issues should gain in importance and undoubtedly will be litigated more specifically in future cases. In *Sullivan*, the Court was concerned about the chilling effect of defamation judgments on reporting. When alternative theories produce very substantial damages for reporting truthfully on matters of public concern (as was true in both *Cohen* and *Sanders*), there is a very substantial chilling effect on the media. Since the constitutional issue was not raised in the lower courts, the court did not address it.[38] Moreover, the very existence of the litigation undoubtedly has a negative impact on the press' willingness to report on matters of public interest. Litigation is costly and few media organizations want to become embroiled in extensive and continuing litigation. As a result, cases like *Food Lion*, *Cohen* and *Sanders* have the potential to limit press usage of overly aggressive forms of undercover reporting. The day of gentlemanly behavior in the press so lauded in the seminal Brandeis piece has now passed. The tabloid press that is "often shrill, one-sided, and offensive, and sometimes defamatory," must be tolerated.[39] The courts, however, will draw a line when press behavior is gratuitous and tramples on other rights. Based on *Cowles*, the Court does not deem such tactics worthy of special constitutional protection. Only time will tell whether these alternative suits have had a major impact on the way the press gathers information.

37. *Sanders*, 978 P.2d at 77.

38. *Id*.

39. Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1355 (7th Cir. 1995).