THE JOHN PETER ZENGER AWARD FOR FREEDOM OF THE PRESS AND THE PEOPLE'S RIGHT TO KNOW

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MALICE IN WONDERLAND

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by Fred W. Friendly
Newsman, Teacher, Author

Tucson, Arizona
November 12, 1983

The University of Arizona
Tucson, Arizona
THE ZENGER AWARD WINNERS

1982 Fred W. Friendly, Edward R. Murrow Professor Emeritus, Columbia Graduate School of Journalism
1981 Paul S. Cousley, Publisher, Alton (Ill.) Telegraph
1980 Walter Cronkite, CBS
1979 Jack C. Landau, Executive Director, Reporters Committee for Freedom of the Press
1978 Robert H. Estabrook, Lakeville Journal
1977 Robert W. Greene, Newsday
1976 Donald F. Bolles, Arizona Republic
1975 Seymour M. Hersh, The New York Times
1974 Thomas E. Gish, Editor and Publisher, The Mountain Eagle
1973 Katharine Graham, Publisher, The Washington Post
1972 Dan Hicks Jr., Editor, Monroe County Democrat
1969 J. Edward Murray, Managing Editor, The Arizona Republic
1968 Wes Gallagher, General Manager, The Associated Press
1967 John S. Knight, Knight Newspapers, Inc.
1965 Eugene C. Pulliam, Publisher, Arizona Republic and Phoenix Gazette
1964 John Netherland Heiskell, Publisher, Arkansas Gazette
1962 John H. Colburn, Managing Editor, Richmond (Va.) Times-Dispatch
1960 Virgil M. Newton Jr., Managing Editor, Tampa (Fla.) Tribune
1959 Herbert Brucker, Editor, Hartford Courant
1958 John E. Moss, Chairman of House Government Information subcommittee
1957 James R. Wiggins, Vice President, Executive Editor of the Washington (D.C.) Post and Times Herald
1956 James S. Pope, Executive Editor, Louisville Courier-Journal
1955 Basil L. Walters, Executive Editor, Chicago Daily News and Knight Newspapers
1954 E. Palmer Hoyt, Editor and Publisher, Denver Post
FOREWORD

The American press is more powerful today than in any other period of our history. Thus, along with the recognized need for the protection of First Amendment rights there is a concomitant need for greater-than-ever responsibility on the part of the press for the trust that it holds.

The person we are honoring tonight as the 29th recipient of the University of Arizona's John Peter Zenger Award for freedom of the press and the people's right to know is one who has devoted much of his life precisely to the pursuit of press freedom and to the insistence always of accuracy, fairness and objectivity in reporting.

Fred W. Friendly, as a fearless and pioneering television network producer, and as an educator and author, has come to represent standards of journalistic integrity and achievement that serve uniquely as a model for all who would make careers in the gathering and dispensing of news.

There are parallels between Peter Zenger's heralded defense of the right to publish and Mr. Friendly's own battles over the years to make certain, for example, that the business of government always be the public's business—and that truth prevail. In this regard, the courage of Mr. Friendly and the late Edward R. Murrow in taking on the deceased, demagogic Sen. Joseph McCarthy should forever serve as inspiration to the men and women of the media.

There is one great difference, of course, between the Zenger era and our day. That is that instant communications have given the journalist an awesome tool, a tool that generally produces immediate impact upon vast audiences—for good or not, I might add.

In the case of Mr. Friendly, as in the case of those journalists previously honored by this institution—Walter Cronkite, A. M. Rosenthal, Wes Gallagher, E. Palmer Hoyt and all of the other distinguished individuals—honesty and integrity have been his and their hallmarks. Today, Mr. Friendly remains the most constant and quoted critic of television's performance in the areas of news and public service.

In one of his books, Minnesota Rag, Mr. Friendly took as his subject the struggle that went on to overturn a Minnesota press gag law earlier in the century, and that led finally to the milestone 1931 U.S. Supreme Court decision finding Minnesota's law unconstitutional. To use the author's words, that book has helped to "illuminate the way this nation's Constitution writes, rewrites and revitalizes itself."

By no means, of course, have questions about First Amendment rights been settled definitively. A central issue remaining is the position generally taken by the press that it may withhold confidential sources of information before courts of law. The U.S. Supreme Court has ruled heavily, but not absolutely, against such privilege and protection for reporters. Meanwhile, two contradictory trends have been emerging in our increasingly complex society: The concept of a qualified First Amendment privilege for reporters, but also an increase in the number of subpoenas seeking confidential information.
One thing there can be no argument about is that the maintenance of press freedom is of decisive importance for the proper functioning of our democracy.

Mr. Friendly today is Edward R. Murrow professor emeritus in the Columbia Graduate School of Journalism and also a lecturer in the Columbia Law School and College. And I am glad to note that his university—I wish it had been ours—has just received a $3 million private grant to establish a center for the study of the First Amendment.

I am pleased to note also that not only does Mr. Friendly have a very special relationship with John Peter Zenger, but so does Mrs. Friendly, who is here tonight. Mrs. Friendly has been described by her husband (who should know) as "the world's finest fifth grade teacher." Each year, Mrs. Friendly's class does a musical play about the life of John Peter Zenger.

Mr. Friendly, it is my pleasure to present you this silver and turquoise plaque, which serves to symbolize the highest traditions of journalism in this country and to honor you as recipient of the 1982 John Peter Zenger Award for Freedom of the Press and the People's Right to Know.

Henry Koffler
President
University of Arizona
November 12, 1983
MALICE IN WONDERLAND

Fred W. Friendly

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."

Lewis Carroll
THROUGH THE LOOKING GLASS

"When the Supreme Court uses a word, it means what the Court wants it to mean. 'Actual Malice' is now a term of art having nothing to do with actual malice."

Charles Brieant, Judge
U.S. District Court

"The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."

Lewis Powell, Associate Justice
U.S. Supreme Court

Two hundred forty-four years after the trial of John Peter Zenger, libel is still a shifting field of law. In that day the heavy hand of an oppressive New York colonial government was raised against a manual press operated by a poor immigrant printer. Both sides have changed. Today the defendants are often powerful institutions. They command miracles of communication that neither Zenger nor the drafters of the First Amendment could have imagined. These giant institutions are defending themselves against multi-million dollar lawsuits brought by the famous and not so famous who claim they have been defamed. The tension in modern libel law arises not just from the clash between the government and the press, but also from the confusion over a twisted constitutional concept known as malice. The wisdom embodied in judicial opinions and explanations, and in lawyer's arguments about that term could be collected in a book best titled "Malice in Wonderland." Judges have difficulty explaining malice, jurors cannot begin to understand it, and journalists perceive it as something out of Jonathan Swift or Lewis Carroll.

Most journalists and a few jurists such as Justice Hugo Black would abolish all libel laws. Yet there have been libel judgments that many journalists cheered. There were toasts in the newsroom when Quentin Reynolds won a judgment of $175,001 from Westbrook Pegler who had accused Reynolds of being a "yellow"
war correspondent, and appearing nude in public — among other false charges. When John Henry Faulk, a CBS talk show host, sued Aware, Inc., for labelling him a Communist conspirator, Ed Murrow not only encouraged Faulk to sue for libel, but advanced him $7,500 to retain a law firm. Reynolds and Faulk were public figures; but proof of malice was not what the jury was asked to decide. They were asked to judge whether the accusations were true or not, and damaging or not. They weren't true, and they were damaging — Faulk and Reynolds won.

My generation of journalists was brought up to believe that truth was not only the best defense against libel, but the only one. It was not always a comfortable criteria, but it taught us a rigorous discipline.

*Times v. Sullivan*, in 1964, changed that. Most journalists applauded it. Professor Alexander Mieklejohn proclaimed that it was a time for all journalists to be dancing in the streets. I was not among the dancers, because I was confused by that term "actual malice" and its definition "knowledge that [what was written] was false or with reckless disregard of whether it was false or not." I thought I understood that word malice, but it was not clear to me how or why it meant what the Supreme Court had said it meant.

The origin of the word "libel" comes from the French — "libelles," which means "little books." At the time of the French revolution, small books, journals, were being written by the revolutionaries which were damaging to the reputation of the aristocrats. Things being as they are — or were — the aristocrats were permitted to sue to vindicate their lost reputations. What I understand about it, and most particularly the varying concepts of malice used throughout the years, in large part comes from the monumental book on libel written by Robert Sack. It is a book that every journalist and jurist should own.

In this country, libel law has a very long history. In the Zenger trial in 1735, Andrew Hamilton asked the court: "Ay, Mr. Attorney, but what standard rule have the books laid down by which we can certainly know whether the words or signs are malicious?"

Earlier, Andrew Hamilton, while acknowledging that there were such torts as libel, told the court that "what my client (Zenger) is charged with is not a libel." Hamilton contended that Zenger's newspaper could be guilty of "... scandalous, seditious (libel) and tend to disquiet the people . . ." without any charge from the Crown that what was written about Governor Cosby was "false." The prosecutor then spoke those now infamous words, "that it may be a libel notwithstanding that it may be true." In contrast, Hamilton's maxim was that truth could be a defense in libel. Hamilton made his case, and history, by telling the presiding chief justice that the Crown "has only to prove the words false in order to make us guilty." The jury of twelve colonial subjects agreed with Hamilton and acquitted Zenger — perhaps more to get back at the imperious British governor than to create new law. In fact, the Zenger verdict did not by itself establish truth as an absolute defense, but "it was the germ of American freedom," as Gouverneur Morris phrased it — "The morning star of that liberty which subsequently revolutionized America." It was the beginning of the notion that truth was the best defense.

The circuitous trail of American libel is pock-marked with attempts by government to stifle dissent. Even Thomas Jefferson believed that "traitorous opin-
ions” could be punished. In fact, when he read Madison’s draft of the First Amendment, he suggested the following alterations: “The people shall not be deprived or abridged of their right . . . to publish anything but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations.” And although as president he let the Alien and Sedition Acts expire, he felt that the states had the right to punish libel. In 1803, he wrote, “I have therefore long thought that a few prosecutions (for libel) of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses.”

Yet not all libel developments or press protection were of such a serious, constitutional magnitude — some were even humorous. There was the case of the Cherry Sisters v. Des Moines Leader. This 1901 case established “fair comment” for critics of performing artists, authors and even chefs.

The Cherry sisters were the “toast of New York,” not because they were so talented, but because they were so bad, “so ghastly fascinating.” The word “camp” meant something else at the turn of the century but it was that spirit of derisive laughter that filled vaudeville theaters at Times Square and throughout the nation whenever the Cherry Sisters’ name went up on the marquee. When Effie, Addie, Jessie, Lizzie and Ella Cherry appeared at a vaudeville theatre in Des Moines, Iowa, Billy Hamilton, a critic for a small suburban weekly known as the Odebolt Chronicle, was not caught in that same rapture. He wrote:

“Effie is an old jade of 50 summers. Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monsterosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around that stage with a motion that suggested a cross between the danse du ventre and the fox trot — strange creatures with painted faces and hideous mien.”

Addie Cherry hired a lawyer and sued the Des Moines Leader, a much larger city paper that carried Hamilton’s review, for defamation. After watching the Cherrys perform, in an unprecedented trial, Judge C. A. Bishop ruled against the Cherry Sisters. Comment, no matter how devastating, was protected as “fair comment,” wrote Judge Bishop. Affirming Judge Bishop’s decision, the Iowa Supreme Court declared: “There is a manifest distinction between matters of fact and comment on, or criticism of undisputed facts or conduct. Unless this be true, liberty of speech and of the press guaranteed by the Constitution is nothing more than a name.”

Not all publishers have been willing to stand up to libel suits. Often over the years publishers abandoned principle to settle out of court. In the trade, they are called “pilgrims” — early settlers. One of my favorite cases of any early settlement involved an electrocution at Sing Sing, some sloppy copy editing, $900 and the eventual wrath of the founder of The New York Times, Adolph Ochs. It is a little known incident in the annals of American journalism, but it makes a useful teaching tool for those concerned with small mistakes. The case is Close v. New York Times, Johnson v. New York Times.
A Times headline of December 16, 1921, indicated only that a "wife slayer, 60, is put to death." The sub-head reported that George Brazie, a Cooperstown farmer, was the oldest man ever executed at Sing Sing. In the non-byline account of the electrocution, all the usual essentials about the condemned man's last supper of Delmonico steak and fried eggs, and a brief account of how Brazie shot his common-law wife were included. Tucked into the fifth paragraph was a comment credited to the Protestant chaplain of the prison. Reverend Antony Peterson was reported as believing that Brazie was innocent. "His lawyers neglected his interests during the trial," the Times story said. The court-appointed attorneys who defended Brazie at the murder trial were not identified in the news story, but the burden of the minister's comment was that the convicted prisoner never received a copy of the minutes of the trial or his appeal, "although prison attendants say that condemned men always get these documents from their lawyers."

The attorneys, Sheldon H. Close, an official of the Republican County Committee, and John G. Johnson, both felt that their professional reputations had been defamed, and sued The New York Times for $25,000 each.

Adolph Ochs sailed for Europe under the impression that the Times' lawyer, Alfred A. Cook, would litigate the case to the limit. When he returned that spring, there was a letter advising the publisher that "fearful of the disposition of juries in these days," the Times had settled "a very difficult situation for a song . . ."

When Ochs learned about the pre-trial settlement, he fired off a letter critical of the lawyer's decision. "You know my views about settling libel suits . . . I would never settle a libel suit to save a little money," scolded the Times publisher. "If we have damaged a person we are prepared to pay all he (the plaintiff) can get the final court to award and we accept the decision as part of the exigencies of our business."

The lawyer defended his settlement decision explaining that the reporter who filed the original story from the death house had not erred, but that "in the rewrite it was asserted that the interests of the condemned man were neglected during the trial." Convinced that the upstate jury of Close and Johnson's neighbors would be sympathetic to the lawyer's claims of damages, the Times' lawyer agreed, on the eve of the trial, to settle for $900 in damages, saving an additional $1,500 in trial fees.

Ochs was unconvinced. "Settlement was never a wise policy," he scolded. "I am sorry you settled and did not contest even though the prospects were not encouraging." From that day on, Adolph Ochs never permitted a settlement, and it has continued to be the policy of The New York Times to fight all libel claims.

In spite of this attitude, most litigation is settled long before it goes to trial. And it is a curious footnote that the news media — which believes that the public has "a right to know" everything — often stops short when it comes to revealing the details of libel settlements. Everything else in the country leaks — national security secrets, sex scandals, even personal bank statements but the amounts of money paid in libel settlements are one of the most closely guarded secrets in America.

Forty years after the Johnson and Close case, The New York Times was to be involved in what turned out to be the libel case of the century — Times v. Sullivan, perhaps the most significant defamation trial since Zenger.
MALICE IN WONDERLAND

It all began with a full-page newspaper advertisement in *The New York Times* on March 29, 1960. Actually, the origin of that advertisement was an editorial on the traditional page of opinion of the publication which concluded with the plea: “Heed Their Rising Voices.” It was during the final year of the Eisenhower administration, six years after the *Brown v. School Board* decision, and in the vortex of the civil rights demonstrations. The editorial was a call to Congress and to the American public:

“The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable . . . Let Congress heed their rising voices . . . for they will be heard.”

The *Times* editorial indicated that “the real radicals in this debate” are those who are trying to block the Fifteenth Amendment and “the right of citizens . . . to vote (regardless) of race, color or previous condition of servitude.” That editorial angered many white supremacists in Montgomery and Birmingham, but no one threatened to sue.

Ten days later a full-page advertisement appeared in *The New York Times* echoing the editorial, and then went on in ten paragraphs to describe the indignities and cruelties that Martin Luther King and hundreds of “non-violent” Negro demonstrators were being subjected to in Montgomery, Orangeburg, Tallahassee, Nashville, Memphis and “a host of other cities in the South.” The advertisement was signed by more than 85 black and white civil rights leaders ranging from Harry Belafonte to A. Philip Randolph, and from Eleanor Roosevelt to Sammy Davis Jr. The advertisement, which cost $5,160, contained a coupon asking for funds to be sent to “The Committee to Defend Martin Luther King and the Struggle for Freedom in the South.”

Other voices were also being heard and causing resentment in the South. Harrison Salisbury of *The New York Times* had written of the “fear and hatred (that) grip Birmingham.” He compared the mood in Alabama to the “sickening mood of Moscow in the Stalin days . . .” In a spate of invective the newspapers in Birmingham and Atlanta accused Salisbury of “foaming at the mouth” and of spreading “this almost total lie.” The Montgomery Advertiser was particularly incensed at the “Heed Their Rising Voices” advertisement. Its editor, Grover Hall, attacked it as “Lies, lies, lies,” and demanded that the *Times* apologize for this “slanderous lie.” The secretary of state of Alabama proposed criminal prosecution of the sponsors and publishers of the ad.

On April 16th, one month after the advertisement, the three city commissioners sued *The New York Times* for libel. None of the the commissioners was ever named in the advertisement, but they claimed that they had been defamed by implication. L. B. Sullivan, commissioner of public affairs, who supervised the Montgomery Police Department, Fire Department, Department of Cemetery and the Department of Scales, sued the purchasers of the ad, and *The New York Times*. The Montgomery County Court awarded him damages amounting to $500,000.

On May 5th, Harrison Salisbury, whose reports for the *Times* had been so critical, so charged with reference to Hitler’s storm troopers that the editors in New York deleted many of the references, was sued together with the *Times*. Three
commissioners of Birmingham, including Theophilus Eugene “Bull” Connor, charged the Times and Salisbury with libel, each commissioner demanding $500,000 in damages. Three weeks later, three commissioners in Bessemer, Alabama, where U.S. Steel manufactured steel, brought similar suits. In all, more than $6,000,000 in libel actions were brought against the Times. Similar suits would soon be brought against CBS News whose reports were equally offensive to Alabama’s officials and power structure.

In Times v. Sullivan, as the Montgomery case was called, Commissioner Sullivan won a $500,000 damage award in the Montgomery County Court. The Supreme Court of Alabama affirmed. The case had raced through the Alabama courts without a single dissent and was argued in the Supreme Court of the United States on January 6, 1964. On the eve of the trial, M. Roland Nachman Jr., Sullivan’s lawyer, predicted that “the only way the court could decide against (Sullivan) was to change one hundred years or more of libel law.” It did.

Few times in history has a brief and courtroom presentation made such a difference as did Professor Herbert Wechsler’s argument. The Columbia faculty member, retained by the Times’ law firm, framed the newspaper’s case in the light of history and deftly raised the spectre of seditious libel, as one constitution scholar notes:

MR. WECHSLER: . . . We are actually making here . . . the same argument that James Madison made and that Thomas Jefferson made with respect to the validity of the Sedition Act of 1798 . . . If I take my instruction from James Madison, I would have to say that within any references that Madison made I can see no toying with limits or with exclusions . . . The proposition is that the First Amendment was precisely designed to do away with seditious libel, and seditious libel was the punishment of criticism of the government and criticism of officials . . . I believe that if James Madison were alive today, so far as anything that I can see in anything that he wrote, particularly in the report on the Virginia Resolutions, that the submission that I am making is the submission that he would make.”

Wechsler admitted that there were certain minor errors of fact that the Times advertising department should have checked. Of the ten paragraphs of text, paragraphs three and six erred in stating such details as, “The students sang ‘My Country ’Tis of Thee’ on the State Capitol’s steps” instead of ‘The Star Spangled Banner,’ and that “truckloads of police . . . ringed the Alabama State College campus.” It should have been reported that police were deployed. In paragraph six, the advertisement claimed that Dr. King had been arrested seven times when the correct figure was four.

Justice William Brennan’s opinion for the majority retraced history of the First and Fourteenth Amendments. Stretching back to the Sedition Act of 1798, he wrote:

“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. [10]
Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional."

Recognizing that the "Heed Their Rising Voices" advertisement did contain certain errors of fact, Justice Brennan stressed that the advertisement was ultimately an impersonal attack on government operations, and that there was no direct evidence "to connect the statement with respondent (Sullivan)." At that point, however, Brennan and the Court went beyond the common law of libel and brought the First Amendment into the field. The majority of the court did not want fear of mistakes to discourage free criticism of public officials.

Raising as it does the possibility that a good faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutional protected area of free expression.

The court found the evidence constitutionally insufficient to support a finding of libel.

The heart of the decision established the relationship of public officials and error in opinions critical of them. The Supreme Court established a new libel rule that:

prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Dean Prosser called *Times v. Sullivan* "unquestionably the greatest victory ever won by the defendants in the modern history of the law of torts." Justices Black, Douglas and Goldberg dissented because they felt the opinion did not go far enough; they would have made it unconstitutional for a public official to win a libel judgment. Eventually all the cases brought by Southern public officials were either dropped or reversed on appeal because the malice standard of known falsity or reckless disregard could not be met.

Since then the meaning of "actual malice" has presented problems of definition. Judges have difficulty explaining it to juries and editors and lawyers are understandably stumped when they explain it to reporters. To borrow from Lewis Carroll in *Through the Looking Glass*:

"When I use a word, 'Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean — neither more nor less."

Judge Charles L. Brieant of the U.S. District Court reflected that same sentiment in a 1977 opinion (*Reliance Insurance Company v. Barrons*):
"When the Supreme Court uses a word it means what the Court wants it to mean. 'Actual Malice' is now a term of art having nothing to do with actual malice."

Despite that admonition, Judge Brieant tried to take a stab as to what he thought the Supreme Court meant by "malice":

"In the context of a libel 'actual malice' simply does not mean ill will or spite. Rather, 'malice' must be taken to mean fraudulent, knowing publication of a falsehood, or reckless disregard of falsity. And we note that reckless does not mean grossly negligent, its common use, but rather, intentional disregard."

Returning to the facts of Sullivan, the libel test would require the plaintiff to prove that when the *Times* editors published the advertisement, they knew that the allegations in paragraphs three and six were lies, laughed or wept about the distortions and decided — "The hell with it; we'll run it any way." Such knowledge or even suspicion was, or course, not the case.

Three years after the Sullivan decision, the Supreme Court extended the malice standard to include public figures. The case involved a *Saturday Evening Post* article that charged that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game. Although Mr. Butts won his case, the court said that "if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved." Butts was a public figure, but the story was not "hot news" and the magazine had not checked the story thoroughly enough.

Despite the new standards, libel cases flourished, especially a new rash of television cases. As case after case move through the courts, the malice standard continued to confuse me and, perhaps, most of the rest of the American public — including many lawyers and judges. It wasn't until *Herbert v. Lando* — a case against "60 Minutes" — that I really came to grips with the critical problem of that standard.

"60 Minutes" has been involved in over 150 libel cases, but none have lasted as long and been as tortured as the *Herbert* case, now in its tenth year of litigation. Anthony Herbert was a soldier's soldier, a combat hero of the Korean War and Vietnam. Then he was relieved of his command and wrote a book — *Soldier*. In it and in a celebrated, fawning interview with Dick Cavett, Colonel Herbert recounted tales of the physical and psychological abuses and cruelties committed by U.S. combat troops on Vietnamese civilians and Viet Cong prisoners. He told of how women and children had been massacred. Among those targeted were her own superior officers.

"60 Minutes" producer Barry Lando and correspondent Mike Wallace decided to do a television portrait of Herbert only to find that Colonel Herbert's own fellow officers disputed his claims. His book, they charged, was full of inaccuracies, and it was suggested that Herbert was using the war crimes stories to explain his own relief from command. And so what began as a portrait of a "soldier" became an
indictment of his charges. After the broadcast, Lando wrote an article about Herbert for the Atlantic Magazine.

Colonel Herbert felt that he had been libeled and that his "reputation and good name were destroyed and he sustained severe financial losses" in book sales. He sued CBS, Lando, Wallace and the Atlantic for $44 million, charging that the "program had falsely and maliciously portrayed him as a liar and a person who had made war crimes charges to explain his relief from command."

What happened next is the essence of the malice problem. The lawyers — Jonathan Lubell for Herbert and the late Carl Eldrich for CBS — began the seemingly endless process of discovery and deposition. Discovery is like a ball game where there is no first quarter, second quarter — no final whistle. It's an endless, exorbitantly expensive process which is debilitating both to the defendant and the plaintiff. Herbert conceded that he was a public figure and so to prove his case he had to prove that Lando and Wallace produced the program with the knowledge that the statements were false or with reckless disregard of whether they were false or not. To do this, Lubell began asking Lando questions about his thoughts, opinions and conclusions during the editing process. Although Lando had been willing to answer any questions about the facts he knew, he realized that the new line of questioning was heading down that "slippery slope" into what he felt were privileged editorial decisions. He refused to answer on the ground that the First Amendment protected him from questions about his state of mind during the editorial process.

The libel suit was stalled while this thorny question was taken through the courts. CBS hired Floyd Abrams — perhaps the leading First Amendment attorney in the nation — to defend their position. Although the District Court first ruled that Lando would have to answer, CBS won a stunning victory in the Court of Appeals for the Second Circuit. Some say the victory was too big, too sweeping in its First Amendment holdings.

When the case finally reached the U.S. Supreme Court, the Circuit Court was reversed. Times v. Sullivan and its progeny, the court said, "made it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant . . . Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination." Even Justice Brennan, who dissented in the case, concurred in part of the conclusion. Although recognizing First Amendment protection and some editorial privilege, he said, "If . . . a public figure plaintiff is able to establish to the . . . satisfaction of a trial judge that the publication at issue constitutes defamatory falsehood, the claim of damaged reputation becomes specific and demonstrable, and the editorial privilege must yield." Lando would have to answer the questions.

But there was some solace in Justice Potter Stewart's dissenting opinion. He struck at that term "malice."

"Although I joined in the Court's opinion in New York Times, I have come greatly to regret the use in that opinion of the phrase 'actual malice.' For the fact of the matter is that 'malice' as used in the New York Times opinion simply does not mean malice as that word is
commonly understood. In common understanding, malice means ill will or hostility, and the most relevant questions in determining whether a person's action was motivated by actul malice is to ask 'why?' As part of the constitutional standard enunciated in the New York Times case, however, 'actual malice' has nothing to do with hostility or ill will, and the question 'why' is totally irrelevant. . . . The gravamen of such a lawsuit thus concerns that which was in fact published. What was not published has nothing to do with the case. And liability ultimately depends on the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing — not at all, in other words, upon 'actual malice' as those words are ordinarily understood."

After nine years, Herbert v. Lando is still in the discovery process. Unless the motion for summary judgment is granted, it will go to a jury who will be asked to wrestle with that "Humpty-Dumpty" term "malice" that disturbed Justice Stewart. Add to that witches brew the fact that the jury will not only be asked to sort out amorphous facts, but also to set the punishment, and perhaps even to award punitive damages. When juries decide punishment in libel cases, their natural sympathies tend to lie with the damaged plaintiff with whom they can identify far more easily than with the powerful and sometimes arrogant news organizations. Even though the charge by the judge may technically favor the media, it is difficult for the jurors to dampen their inclinations and identify with an abstract First Amendment. Their decisions almost always produce damages against the media, often with "megabill" punitive damages added on. Statistics say it all. About ninety percent of libel judgments are initially decided against the news organizations and over seventy percent of those punitive "fines" are reduced or reversed on appeal. These are pyrrhic victories which cost millions to defend, which seem to impune the good name of serious journalists, and worst of all, cause many publishers to stay away from tough, hard-hitting, responsible but "vulnerable" reporting. Ironically, in the Zenger case it was the jury who became his great protector. In 1983 the tables have turned, and it's the judges who are protecting the press from crippling, multi-million dollar judgments.

If you think I'm exaggerating about how a jury can be swayed, let me tell you that every time I show the Herbert film to my students, many of them get caught up in the same quagmire. They talk about harsh lighting and ambush journalism, but miss the whole point. Facts. Truth. They don't look at the program and analyze the content; they look at all the journalistic "tricks of the trade" and scrutinize the show from the inside out.

This is what may happen if the Herbert case goes to the jury. They may not only be asked to determine the fact, but to become adjudicators of journalistic ethics and editorial practices. That happens to be a terrible distortion of what libel law is all about.

All of which brings us to the Westmoreland case. General Westmoreland, a fine general who did his best in Vietnam, is locked in a bitter, politicized encounter with CBS News — probably the most respected broadcast news organiza-
tion in the world — over the documentary “The Uncounted Enemy; A Vietnam Deception.”

The main thesis of the 90-minute broadcast is that the Army misled the American public, the Congress and perhaps even President Lyndon Johnson about the true strength of the Viet Cong and the infiltration of North Vietnamese regulars. Accusing fingers are pointed directly at high levels of Army intelligence and indirectly at General Westmoreland. To this day, no one has disputed the main thrust of the program — that the Army was systematically reducing the estimates of enemy strength. What facts seem to be in dispute are whether the reasons for those reductions were justified as sound military intuitiveness or were a politically motivated “conspiracy” to deceive the public and Washington.

Angry about the implications of not just the program but the full-page New York Times advertisement of the program and the on-air promotion, General Westmoreland, flanked by several supporters, held a news conference attacking the broadcast. He then began a series of protracted negotiations with the network including a request for 45 minutes of air time. CBS offered 15 minutes of prime time. The offer of reply time was the right thing to do. I can’t help but think of the McCarthy broadcast when Ed Murrow said, “If the senator feels we’ve done violence to truth, he can have a half hour of reply time next week.” Apparently the 15 minutes were not enough for the general.

Although there was initial flak over the program, the escalation came after a TV Guide article by Sally Bedell and Don Kowet, entitled “Anatomy of a Smear: How CBS News Broke the Rules and ‘Got’ General Westmoreland.” The hard-hitting critique did not judge the central premise of the documentary but charged that CBS producer George Crile had broken internal guidelines by coaching witnesses and presented an unbalanced view by ignoring witnesses who would have challenged the conspiracy thesis.

CBS, which was in the middle of its annual affiliates meeting, through its new news division head, Van Gordon Sauter, announced that it would do an internal investigation of TV Guide’s charges. For the next two months, Burton Benjamin, a senior executive producer, waded through documents, interviews and history books. He compiled an exhaustive memorandum which criticized the program for breaking the network guidelines. A week later, Sauter issued a press release conceding that the use of the term “conspiracy” was inappropriate, but that CBS supported the substance of the broadcast.

General Westmoreland, who had been contemplating a libel suit, was now even more angry. He felt that he had been defamed a second time because of the announcement. On September 13, 1982, he filed a $120 million libel suit against CBS.

I have screened the documentary several times. I’ve read the Benjamin Report and countless other documents and articles, and my conclusion is that CBS News and Westmoreland are fighting their own Vietnam war, a war that can’t be won by either side.

The broadcast was flawed, perhaps even unfair. Crile admitted several serious journalistic sins: to list a few — hiring a consultant for $25,000 and then using him both as a central interviewee in the documentary and a type of associate
producer. The payment was not mentioned in the script. Another ethical problem: After interviewing one CIA agent, Crile decided to take him into the editing room to show him the original rushes of his interview and several others. Then he re-interviewed the same agent. Such practices are UNACCEPTABLE in any newsroom, broadcast or print.

CBS News has been criticized by media partisans for even commissioning the Benjamin Report. It is claimed that it helped bring about the libel suit and presented General Westmoreland with a discoverable document of evidence. It is argued that a lawyer with all the protections of the lawyer-client privilege should have conducted the investigation to keep the documents out of the courts. Ridiculous.

But lawyers ought to stay out of the newsroom, and more importantly, the questions raised by the Benjamin Report should have been asked before the "go-no go" decision was made. CBS should be criticizing itself, for not keeping the firm hand of an experienced executive producer on Crile. It should be criticizing itself for leaving Crile as the scapegoat. He should be put back to work, not left twisting slowly, slowly in the wind. His bosses, the gatekeepers of what gets on the air and does not, are responsible. They are the keepers of the faith, the custodians of the standards. They, too, are all accountable for the flaws.

But what everyone seems to be forgetting is that what we are talking about in this case are flaws of journalism, perhaps even bad editorial judgments — and these are not the stuff of libel disputes. To paraphrase Justice Stewart, the issue is what was broadcast; what was not broadcast or how it was put together has nothing to do with the case. CBS News guidelines are not libel laws.

Yet since General Westmoreland began his case, all we've heard about are ethics and standards; nothing about the essence of libel. It's as if someone's been driving all across the country, gets to California and has a car accident. Then the police retrace his route to try to prove that the car was smashed. You should be looking at the car, and to see if anyone was hurt — not his travel plan.

If this case continues on the current track of obfuscating the major issue of the editorial thrust with journalistic questions, the twelve men and women of the jury will be asked to make a judgment about a war that will be in controversy for 100 years and about journalism — but not about libel laws. They will be looking so intently into the minutiae of how the program was put together that they will not be able to see the whole picture. And ultimately they may judge CBS News guidelines as if they were law.

I have considerable respect for General Westmoreland and his record of duty and honor to his country. But I don't think that he should be suing CBS for libel. When he took command of the U.S. forces in Vietnam, it was like stepping into Macy's window. As a public official involved in a controversial war, he had to be ready to take the heat, the exposure and the criticism. The press should be free to critique and analyze his public conduct or that of any other public official unless the charges against them are such specific, provable facts as that a general slapped a soldier in the field hospital, or in the case of a municipal malfeasance where a mayor was accused of taking a bribe. In the matter of General Westmoreland, however, we are talking about not some clear cut fact, but a controversial subject which may
never be settled. What really happened to those enemy estimates may never be entirely clear — even to history. As Justice Powell pointed out in Gertz, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Anthony Lewis, who taught us all the art of reporting on constitutional issues, has suggested that the press should be immune from all libel claims by public officials dealing with their public conduct. With all due respect, I think this is an unrealistic approach. It would never be accepted by the current court or by the court of public opinion. Narrow the standard, yes, but it probably can’t be eradicated completely.

So where does it all bring us? As one who has spent his whole professional life revering the First Amendment, defending it, explaining it, attempting to prevent zealots from overheating it, I reluctantly must conclude that Times v. Sullivan and its fallout in the Herbert case have put a terrible strain on freedom of the press. It comes from the misunderstandings and misuse of the word "malice" and from a public which is tired of abuses of the press — sometimes imagined, sometimes all too real — and that public is ready to award millions to any aggrieved plaintiff. Sometimes I almost think that I’d rather have no Sullivan defense at all if the price of it is judges holding court in the newsroom, passing judgment on every editorial decision. We’ve already heard a loud and clear warning that the courts can have difficulty separating journalistic practice from substance. Justice Harlan’s four-man minority — a close call — in the Butts case was a harbinger of that threat.

"We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Is that what we want? — Judges or juries making those decisions?

And what about damages? Tort law offers recovery for proven recoverable damages, whether it be a vehicular accident, a faulty pacemaker or a leaky roof. Punitive means punishment established by legislatures and imposed by courts — a $5 fine, a $5,000 fine, a year in prison. Juries are skilled at reaching the verdict on facts — did the defendant murder John Doe; was there a breach of contract by the corporation; who ran the red light? They may even assess the extent of actual damages. Sentencing is traditionally left for the judges. But when jurors efficient at factfinding, unschooled at punishment, susceptible to emotional responses, begin to impose $25,000,000 fines, and $100,000,000 punitive damages, the courts are permitting the system to become a mockery. The record of excessive punitive awards says it all.

Juries routinely award reasonable compensatory damages for harm done, and then award extravagant punitive damages of millions, sometimes tens of millions of dollars. Just as routinely, the appellate judges reduce the punitive
damages, or simply remove them. It is a senseless ritual in which only the attorneys win. All the publicity centers on the original award, and that encourages other libel litigations. The defense lawyers appear to have saved their media clients millions, and their enormous bills are paid with a gasp of relief. No one ever points out that punitive damages in press cases ignore the protections of the First Amendment and threaten the constitutional protection of freedom of the press. The appellate judges understand that, but too many trial court judges don’t seem to. As Justice Powell said in *Gertz*,

“The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.”

That’s why runaway punitive damage awards have frustrated the litigants on both sides and caused libel law to collide with First Amendment values. Add to that burlesque the ambiguity of that word “malice,” and the courts may have committed a reckless disregard for the First, Fifth and Fourteenth Amendments.

So what can we do about it. A simple proposal would be to recognize in law what is happening in fact: take the power to award punitive damages away from the jury and vest it in the judge. It’s as simple as that, as many thoughtful judges — conservative and liberal — have told me, some even in writing. However, there may be a bolder alternative. It may be that the time has come to eliminate punitive damages from the law of libel as it relates to freedom of the press. In fact, the term “punitive damages,” when it involves free speech values, is virtually a contradiction in terms. Its sole purpose is to deter and to chill. Without *Times v. Sullivan*, the civil rights movement might have gone unreported; without a change in the law governing punitive damages, the press may be stifled from courageous reporting of crucial issues. My conclusion? Compensatory damages — yes, if you can prove them — punitive damages — no.

Everything has a price, even freedom. It may be that the news media must pay a price for abolishing the pernicious doctrine of punitive damages — such as lowering the plaintiff’s burden from proving “actual malice” to something less, like gross negligence. Would the media really be giving up so much? In common law, malice — ill will — was the foundation for an award of punitive damages. When *Times v. Sullivan* made “actual malice” an element of the plaintiff’s case, and the very same proof the basis for punitive damages, it turned the word on its head; now every garden variety libel action is governed by *Times v. Sullivan*. If there is liability, there can be damages; if there are damages there can be punitive damages. The *Times v. Sullivan* standard, which was supposed to be a rule that deterred libel actions by public officials, has, in the era of *Herbert v. Lando* led to inquisitions into the state of mind of journalists with punitive damages at the end of the road.

To conclude: It’s time to put the lid on punitive damages and on the exhaustive, unending discovery process. Perhaps more importantly, it’s time for
judges to clean up the definition of malice, and it's also time for journalists to clean up their act. Unless we start producing our television documentaries and newspapers as if truth is our only defense, proving malice or absence of malice will continue to call journalistic practices into question and into court; juries will continue to be impressed with claims that sloppiness or bad judgment is tantamount to recklessness. Arrogant, amateurish, careless reporting, and haphazard editing give litigators a field day. It always seemed to me that Ed Murrow survived the attacks of his enemies, foreign and domestic, not because he cloaked himself in the mantle of the First Amendment, but because he walked and worked in fairness.

We certainly don't want laws about fairness — the mistakes of the FCC and the Fairness Doctrine have taught the courtroom and the newsroom that lesson. But access is one key to solving the libel problem. A news organization should be willing to say, "We did a program or wrote an article, and we did it the best we could. We still believe in the facts, but we understand, to paraphrase Murrow, that if the defamed public official believes we've done violence to the truth, we will provide that public official with reply time.

The people that I talk to who are angry at the news media are always saying, "I believe in the First Amendment. I believe in freedom of speech, but there's never a chance for the person attacked to talk back." If we journalists are going to do important, crusading stories such as those on "60 Minutes" or "CBS Reports" or "Close-up" or "20/20" or "NBC White Paper" or public television programs, then we must have a safety valve — access. Reply time is expensive, but if we don't have it, the cost will be far more expensive. It will mean a loss of freedom.

In the Westmoreland case, the general's news conference should have been carried live or recorded and put on the air that night or the subsequent day. The CBS-Westmoreland war would have ended quickly. Many journalistic mistakes — like the Westmoreland show — are self-inflicted wounds. But they harm much more than the producer or the network; they harm all journalism and the First Amendment.

It's time for some statesmanship. It's time for all journalists to say we're going to do serious journalism and part of the responsibility of doing serious journalism is to let people talk back to their television sets, to their newspapers and magazines. If broadcasters and print journalists don't understand that part of their license — not their legal license, but intellectual license; their license of integrity — is to let people talk back, then sooner or later the courts and the public are going to deprive journalists of some of their rights. You can't accuse in a limited access, closed media market without making it possible for people to answer back. If we don't open ourselves up for criticism and correction, we may lose what we cherish the most, our status as the freest press in the world.

I'd like to leave you with a thought written by a past recipient of the John Peter Zenger award, Bob Greene. This is what he said, and I can't think of a better note of caution with which to leave you.

"The worst enemy of investigative reporting is not the timid publisher, the oppressive president, the outraged advertiser or even the biased judge. It is bad investigative reporting. When investigative
reporting loses its credibility with the people because it is wrong, biased, hyped or otherwise unprofessional, its enemies have both the excuse to destroy it and the people's permission to do so."

Amen

If we witness an end to punitive damages, I hope it will not be a time for "dancing in the streets." I would remind my journalist colleagues that the place to win a libel suit is not in the courtroom but in the newsroom.
MALICE IN WONDERLAND

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The University of Arizona Department of Journalism gratefully acknowledges the support and sponsorship of the 1983 John Peter Zenger Dinner by the following contributors:

The Tucson Citizen, The Arizona Daily Star, The Arizona Republic/Phoenix Gazette, Judge Evo DeConcini, Roy P. Drachman, the law firm of Bilby, Shoenhair, Warnock and Dolph, the law firm of Molloy, Jones, Donahue, Trachta, Childers and Mallamo, the First Interstate Bank, Tucson Newspapers, Inc., Supervisor San Lena, the Exxon Company, U.S.A., The Salt River Project and Wick Newspapers Inc.