University of Miami Law Review

Volume 27
Number 1 *Volume 27 Issues 1-2 (Fall & Winter 1972)*

Article 6

1-1-1972

Times to *Rosenbloom*: A Press Free from Libel -- The Editors Speak

Paul J. Levine

TIMES TO ROSENBLOOM: A PRESS FREE FROM LIBEL —THE EDITORS SPEAK

PAUL J. LEVINE*

We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.—Justice William J. Brennan[1]

* * *

The Times *and* Rosenbloom *decisions emancipated newspapermen from timid, over-cautious and establishment-oriented publishers and their lawyers in many U.S. cities. As a result newspapers are doing a much better job of covering news robustly and courageously to the benefit of the public. Timidity has been a much greater danger than excess in the U.S. press. Prior to these cases, politicians cynically used the libel laws to intimidate and silence newspapers, to the public's disadvantage.—Eugene C. Patterson, Editor,* St. Petersburg (*Fla.*) Times.

I. CONSTITUTIONAL PROTECTION FOR ARTICLES OF PUBLIC INTEREST OR CONCERN

The press is not afraid of libel. And why should it be? The warm blanket of the first amendment now protects the press from private libel actions as well as from direct government assaults.

The first amendment, that great shield erected to protect the press from government, staves off the private citizen as well. It matters not whether the defamed individual is a public official or private citizen. In

* Digest Editor, *University of Miami Law Review* and Student Instructor in Freshman Research and Writing.

1. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971) [hereinafter referred to as *Rosenbloom*].

either case, the press is shielded from libel whenever the event is of "public or general interest."[2] Unless the evidence shows by clear and convincing proof that the account is published with knowing or reckless disregard of the truth, the defamed plaintiff cannot recover.[3]

How has the press responded to its new-found freedom from libel? Have the court decisions encouraged the "robust debate on public issues" envisioned by Justice Brennan? They have, according to a majority of newspaper editors surveyed by the *University of Miami Law Review*. The editors were asked how the recent court decisions have affected their own news operations and how they appeared to affect the nation's daily newspapers as a whole. Results of this empirical study comprise the bulk of this article and appear in Section II, *infra*. The survey questionnaire is reproduced in the Appendix.

A. *New York Times Co. v. Sullivan*

The first blocks of the constitutional bulwark were erected by the Supreme Court of the United States in 1964 with its decision in *New York Times Co. v. Sullivan*.[4] The Court ruled that a constitutional privilege attached to press accounts of a public official in the performance of his official duties and that the official could recover for libel only if the statement was made with "actual malice," *i.e.*, with knowledge of its falsity or with reckless disregard of whether or not it was false.[5]

Justice Brennan wrote the majority opinion in *Times*, just as he would seven years later in *Rosenbloom v. Metromedia, Inc.*,[6] when the Court further extended the constitutional protection. In *Times*, he justified the creation of the constitutional privilege as a necessary measure to insure that the press stay vigorous as well as free. It was the chilling effect of libel judgments on future coverage of controversial news events that worried Justice Brennan. The first amendment can be invoked, he implied, to embolden the cowering press, for if truth were the only defense to a defamatory article or broadcast, the press would surely lose the courage needed to fulfill its role as the watchdog of government:

> A rule compelling the critic of official conduct to guarantee the truth of his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[7]

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2. *Id.* at 45.
3. *Id.* at 52.
4. 376 U.S. 254 (1964) [hereinafter referred to as *Times*].
5 *Id.* at 279-80.
6. 403 U.S. 29 (1971).
7. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

Prior to *Times*, the press relied on the common law privilege of "fair comment on matters of public concern."[8] The doctrine protected the press in the expression of personal opinions on matters of public concern. Criticism of the official acts of public officials was protected as were literary and artistic reviews, among other things.[9] A shortcoming of this fair comment doctrine, however, was that in most jurisdictions it protected only defamatory "opinions" and left statements of "fact" open to libel suits.[10]

Times, therefore, protected the press for the first time in one of the most important areas of investigative, hard-news reporting. The exposé, the scandal among government officials, was shielded to the extent of the "actual malice" standard. The first amendment barrier proved to be a difficult one for plaintiffs to hurdle, especially as it grew higher with the ensuing years. Four years after *Times*, the Court declared that knowing or reckless falsity is not proved by showing that the publisher failed to exercise reasonably prudent care in investigating the story.[11] Rather, it must appear that the publisher knew of the statement's falsity or was unconcerned about its truth or falsity.

The Court likewise expanded the scope of the privilege. It ruled that all government employees are "public officials" as long as they hold positions significant enough for the public to be interested in their performance.[12] Even more significantly, the Court broadened the "public official" category to a new "public figure" concept. Therefore, a college football coach accused of fixing a game[13] and a well-known general accused of inciting a riot[14] were public figures who must overcome the judicially imposed barrier of actual malice in order to recover for allegedly defamatory news accounts.

At about the same time, the Court applied the *Times* standard to a case involving a non-defamatory misstatement.[15] The case involved a private person "involuntarily" thrust into the public eye by kidnappers who held his family hostage. He sued for invasion of privacy after *Life* magazine reported that a new play portrayed the family's experiences during the kidnapping. Here the Court appeared to lay the groundwork for the *Rosenbloom* decision which would later apply the "public interest" test to cases of defamation.

> The guarantees of speech and press are not the preserve of political expression or comment upon public affairs, essential as

8. Note, *First Amendment—Extension of the New York Times Rule in Libel Actions Arising from Matters of Public Interest*, 20 J. PUB. L. 601, 602 (1971).

9. Comment, *The Continuing Erosion of the Libel Remedy Against the Press: "An Evil Inseparable from the Good,"* 17 S. DAK. L. REV. 350, 351 (1972).

10. Comment, *Defamation and Privacy*, 23 STAN. L. REV. 547, 549 (1971).

11. St. Amant v. Thompson, 390 U.S. 727 (1968).

12. Rosenblatt v. Baer, 383 U.S. 75 (1966).

13. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

14. Associated Press v. Walker, 388 U.S. 130 (1967).

15. Time, Inc. v. Hill, 385 U.S. 374 (1967).

> those are to a healthy government. . . . We have no doubt that the subject of the article, the opening of a new play linked to an actual incident, is a matter of *public interest*.[16]

By the time the Supreme Court decided *Rosenbloom* in 1971, the "public interest" path had already been taken by lower federal courts which clearly anticipated the movement toward increasing press protection from libel. The courts began applying the *Times* standard to a variety of allegedly defamatory press accounts, each deemed to involve a matter of public interest: a private person's activities in a foreign election;[17] the decline of a grand old hotel at a famous golf tournament site;[18] the identification of plantiff as head of an organized crime syndicate;[19] the massacre of Vietnamese civilians;[20] and a fictionalized account of the "Boston Strangler."[21]

B. *Rosenbloom v. Metromedia, Inc.*

Rosenbloom presented the Court with the question of applying *Times* to a plaintiff who was neither a public official nor a public figure, and who probably was never before involved in a matter of public interest. The Court found that the plaintiff, a magazine distributor, was involved in a matter of public interest when he was arrested on charges of selling and possessing obscene material.

> The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large-scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue.[22]

Justice Brennan[23] described the "artificiality" of the distinction

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16. *Id.* at 388 (emphasis supplied).
17. Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).
18. Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970).
19. Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal. 1969).
20. Medina v. Time, Inc., 439 F.2d 1129 (1st Cir. 1971).
21. DeSalvo v. Twentieth Century-Fox Film Corp., 300 F. Supp. 742 (D. Mass. 1969).
22. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).
23. Chief Justice Burger and Justice Blackmun joined in the plurality opinion. The late Justice Black concurred in a separate opinion in which he concluded that the first amendment protects the news media from libel judgments even when the defamatory statements are made with knowledge of their falsity. *Id.* at 57.

Justice White concurred on the ground that the existing *Times* standard was sufficient to protect the radio station's reports of plaintiff's arrest. The police were acting in their official capacity as public servants; therefore, their arrest of plaintiff opened his reputation to public scrutiny protected by the first amendment under *Times*. *Id.* at 57-62.

The late Justice Harlan dissented because, *inter alia*, "when dealing with private libel,

between public and private conduct upon which the constitutional privilege was formulated in *Times*: "Increasingly in this country, the distinctions between governmental and private sectors are blurred."[24] The Court therefore extended the actual malice standard of *Times* to new and somewhat hazy limits.

> [W]e think the time has come forthrightly to announce that the determination whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases.[25]

With an awareness that "the press has, on occasion, grossly abused the freedom it is given by the Constitution,"[26] the Court nonetheless applied the actual malice standard to a magazine distributor[27] accused of

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the States should be free to define for themselves the applicable standard of care so long as they do not impose liability without fault. . . ." *Id.* at 64.

Justice Marshall, joined by Justice Stewart, dissented, citing problems for the courts if they impose a test requiring a judicial determination "that the event was of legitimate public interest." *Id.* at 79. They also foresaw the danger of "private individuals . . . being thrust into the public eye by the distorting light of defamation." *Id.* at 79. Instead of extending the constitutional protection to a new limit, they would simply limit recovery to actual damages with no award of punitive damages. *Id.* at 86.

Justice Douglas took no part in consideration of the case.

24. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971), *quoting* Chief Justice Warren's concurring opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967).

25. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44-45 (1971).

26. *Id.* at 51.

27. During a police raid on a Philadelphia newsstand, Rosenbloom arrived with a delivery of nudist magazines. Police arrested him on the spot on charges of selling obscene material. Three days later, police obtained a warrant and searched Rosenbloom's home and a barn he used as a warehouse. More magazines were seized and Rosenbloom was arrested a second time. Following that arrest, a police captain telephoned WIP, a local radio station, with information about the raid and arrest. The first item to be broadcast concerning Rosenbloom was the following:

> "CITY CRACKS DOWN ON SMUT MERCHANTS
>
> The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigation Squad also raided a barn in the 20 hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 allegedly obscene books. Capt. Ferguson says they have hit the supply of a main distributor of obscene material in Philadelphia."

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 33 (1971).

The item was re-broadcast several more times during the next day. Rosenbloom filed suit in federal district court seeking injunctive relief to restrain the police from interfering with his business and to prohibit several of the news media from covering subsequent events concerning his magazine business and its legal troubles. WIP reported news of the lawsuit without mentioning Rosenbloom by name. It did, however, use the terms "smut literature racket," and "girlie book peddlers." *Id.* at 34.

A state court jury subsequently acquitted Rosenbloom of the criminal obscenity charges after the judge instructed that the magazines were not obscene. Rosenbloom filed a libel action in federal district court under diversity jurisdiction and the jury found for him in the amount of $25,000 general damages and $725,000 punitive damages. The trial judge reduced the punitive damages on remittitur to $250,000. The Court of Appeals, Third Circuit, reversed, holding that the *Times* standard applied, and that Rosenbloom "failed to provide

purveying pornography on the streets of Philadelphia. Treading the fine line between repression of the press and valid judicial protection of the defamed individual has always been a difficult task. Quoting from James Madison, the Court impliedly admitted the perplexing nature of the problem:

> "Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America."*[28]

II. Freedom From Libel—The Editors Speak

In his lengthy majority opinion in *Times*, Justice Brennan touched upon the broad policy considerations which warranted extending first amendment protections to libel actions:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.[29]

Has the new freedom from libel encouraged the press to be more vigorous? Legal commentators have thoroughly explored the path from *Times* to *Rosenbloom* without answering the question. The commentary thus far has focused on the constitutional niceties of the cases which have decreased the media's liability in libel and slander actions.[30] The

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evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards." Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 897 (3d Cir. 1969). The Supreme Court affirmed, with the plurality opinion adopting much of the reasoning of the Third Circuit decision. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

28. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51, *quoting* 6 Writings of James Madison, 1790-1802, 336 (Hunt ed. 1906) (emphasis in original).

29. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

30. *See* Pierce, *Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. Rev. 315 (1965); Brennan, *Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965); Bertelsman, *First Amendment and Protection of Reputation and Privacy—New York Times Co. v. Sullivan and How It Grew*, 56 Ky. L.J. 718 (1968); Nimmer, *Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Calif. L. Rev. 935 (1968); Comment, *Times Marches On: The Court's Continuing Expansion of the Application of the 'Actual Malice' Standard*, 47 Notre Dame L. Rev. 153 (1971).

more practical problem of whether the cases have actually contributed to an "uninhibited, robust, and wide-open debate on public issues" has been left unmeasured and without comment. This is not surprising since empirical studies of changing news coverage are properly subject to journalistic skepticism. Certainly the media's news coverage changes to some extent in any seven year period and isolating the underlying reasons is bald speculation at best. Nonetheless, under the theory that the nation's editors are the best judges of what the press is doing, and why, the author conducted a survey of the nation's largest newspapers to determine the effects, if any, of *Times* to *Rosenbloom* on news coverage.[31]

Did the cases encourage robust debate on public issues? Have newspapers become bolder in tackling stories of corruption? Have editors increased investigative assignments which, in the past, might have run the risk of defaming either public figures, private persons in the public eye, or private persons engaged in activities of public interest?

Although survey questionnaires of this type[32] may be of limited accuracy and subject to either self-serving answers or simply inaccurate ones, the tabulated results are intriguing, if not empirically foolproof. Perhaps even more interesting than the statistics are the comments added by the editors to explain their concern, or lack of it, with the progression of the libel cases. As an introduction to the statistical data, it might be instructive to relate the comments of one editor who exhibited a distinct distaste for libel suits and an apparent distrust of lawyers:

> The libel suit often seems to take the form of something worked up by lawyers looking for business. I would like to know (although we never will) how often a lawyer spots something in the paper that is patently wrong and approaches a client, offering to split the proceeds. I am talking about a very small percentage of lawyers, but, I think, a large percentage of libel suits. I do not want to libel all lawyers or any appreciable number. I'm sure their ethical standards, as a whole, are as high as those of newspapermen and women.—Robert C. Achorn, Editor, *Worcester* (Mass.) *Telegram and Gazette*.[33]

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31. The survey was intended to reach all the nation's daily newspapers with circulations of 45,000 or more. However, in order to maintain a geographical balance, it was necessary to include many newspapers with circulations of less than 45,000, since some portions of the country have no large newspapers. For instance, the states of Alaska, Idaho, and Wyoming, among others, have no daily newspapers in that circulation range. In these cases, the largest newspaper in the state was polled, so that each state was represented by at least one, and usually more than one newspaper.

In all, 319 questionnaires were mailed and 133 (42%) were completed and returned. They remain on file at the University of Miami Law Review office, Coral Gables, Fla. 33124.

32. The complete questionnaire is reproduced in the Appendix. Some of the questions were used as accuracy checks on others, and as such, not all of the compiled responses appear in this comment.

33. Several other editors expressed the attitude that their problems were more with lawyers than with the law:

The law should provide penalties for attorneys who file harassment libel suits. It

A. *THE QUESTIONS—THE ANSWERS*

The first three questions were intended to discover whether editors thought that expanded freedom from libel actually encouraged the robust debate envisioned by the Court. By more than three-to-one, 76% to 24%, the editors agreed that their own newspapers had increased the type of investigative reporting which in the past might have run afoul of the libel laws. In actual numbers, this is how the answers broke down:

1. Has *your* newspaper's coverage of controversial local issues (e.g., investigative stories of corruption, etc.) increased in the past 5 to 8 years?
   YES 98
   NO 31

But of those answering "yes," the editors were about evenly divided as to whether the increased coverage was the result of the *Times* expansions.

2. Has the expansion of the *Times* doctrine, i.e., more freedom from libel, contributed to the increased coverage?
   YES 49
   NO 47

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is possible through harassment to run up the overhead of a newspaper to the point of bankruptcy.—Robert P. Early, Managing Editor, *The Indianapolis Star.*

A Michigan editor, who asked not to be quoted by name, thought that many of the lawyers filing libel actions were simply incompetent: "We are frequently threatened with libel actions by lawyers who obviously do not know the law," he wrote. "Apparently they do this to create an impression with their clients. . . ."

Finally, one editor took the view that the problem lies both with reckless reporters and over-eager attorneys:

> Much of today's libel problems are the result of the poor quality reporters that are available for hire and the willingness of some attorneys to take any case regardless of merit, depending on the jury to "go for" the little guy rather than the big corporation.—G.N. Ifft, III, President, *Idaho State Journal.*

The disaffection between attorneys and journalists is well known to members of both professions. *See generally* the following, all written by journalists: M. BLOOM, THE TROUBLE WITH LAWYERS (1968); J. GOULDEN, THE SUPERLAWYERS (1971); M. MAYER, THE LAWYERS (1967). Murray Teigh Bloom, who earns his living basically as a magazine writer, is blunt in his opinion of lawyers. He sets the tone of his recent book in the first sentence of the introduction. "My main purpose is to show how the American middle class is victimized by the American legal profession." M. BLOOM, THE TROUBLE WITH LAWYERS 9 (1971).

The journalists' distrust of lawyers may stem partly from a journalistic aversion to "legalese" and the lawyers' willingness to use it as a cloak behind which he might hide from laymen (journalists included) who cannot comprehend this terminology. On the other hand, lawyers and judges often take umbrage at what is considered shoddy and uninformed reporting of legal topics by the mass media. As Justice Rutledge expressed it:

> There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news.
>
> Some part of this is due to carelessness, often induced by the haste with which news is gathered and published, a smaller portion to bias or more blameworthy causes. But a great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen in the law. With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great.

Pennekamp v. Florida, 328 U.S. 331, 371 (1946) (Rutledge, J., concurring).

Of the 49 editors who answered "yes," 29 said that the *Times* expansions contributed to a "small degree," 16 said to a "moderate degree," and 4 indicated it was to a "great degree."

The first two questions related to the editors' opinions of the effects on their own newspapers. Next the editors were asked whether the *Times* expansions caused the nation's newspapers, as a whole, to be bolder in covering possibly defamatory stories of public interest. A majority of 60% agreed that *Times* to *Rosenbloom* was a contributing factor of the increased coverage.

3. In your opinion, has the extension of the *Times* doctrine caused the nation's daily newspapers, in general, to tackle more controversial stories, such as exposes of officials or corrupt business practices, etc.?
   YES 72
   NO 47

In other words, the editors thought that the Court decisions had a greater impact on other newspapers than on their own. While the statistics speak for themselves, one observation might properly be made here. It seems that the editors dearly believe Justice Brennan's theory of emboldening the press by freeing it from libel. While half the editors see this result on their newspapers, another 10% want to believe it is happening elsewhere though the evidence in their own newsroom is to the contrary.

The next three questions dealt with the newspaper editors' reliance on attorneys to check articles for potential libel problems prior to publication.

4. Can you estimate the number of times a libel attorney has been consulted with regard to "controversial" stories prior to publication in the last 12 months?

	Number	*Percent*
None	22	18
1 to 6 times	59	47
7 to 12 times	25	20
13 to 24 times	12	9
More than 24	8	6
Total	126	100

One of the typical responses came from an editor in the 13 to 24 category (once to twice a month):

"We do not shoot from the hip, especially on an afternoon paper where time is limited. We have an excellent, available counsel."—Felix R. McNight, Co-Publisher and Editor, *Dallas Times Herald.*

An attempt was next made to determine whether the *Times* expansions emboldened editors enough to forego the use of attorneys to clear

stories prior to publication. Theoretically, if the Supreme Court cases caused the increased coverage of controversial events, then the use of lawyers might decrease as editors shrug off older fears of libel suits. Conversely, if controversial coverage increased wholly independent of the libel law, then the use of attorneys might also have increased to check the stories for libel.

5. In the past 5 to 8 years, has the number of times your newspaper consulted a libel attorney prior to publication:

	Number	*Percent*
Remained about the same	72	55
Increased	46	35
Decreased	12	10
Total	130	100

Those editors who responded that their reliance on lawyers had decreased were then asked whether "the extensions of the *Times* doctrine contributed to that decrease?" With several unsolicited responses from those who had answered that their use of attorneys remained about the same, 8 answered yes, and 14 no.

The next series of questions were intended to determine the editors' opinions as to the effect, if any, of the *Times* expansions on the quality of newspapers. First, the editors were asked about the nation's newspapers as a whole:

6. In the past 5 to 8 years, have the journalistic standards of accuracy and fairness in the nation's daily newspapers:

	Number	*Percent*
Improved	66	51.2
Remained about the same	37	29.6
Lessened	22	17.1
Other	4	2.1
Total	129	100

Then, those editors who responded that journalistic standards had lessened were asked whether the decline was "the result of the extension of the *Times* doctrine." Theoretically, if the press is no longer liable for non-malicious defamatory statements, editors and reporters could become careless without fear of legal sanction. The response found five editors blaming the Supreme Court for the allegedly decreased standards of accuracy and fairness and 19 citing wholly independent reasons (two editors answered who had replied that the standards remained about the same).

"I feel the trend toward advocacy journalism among new reporters has lessened accuracy—fairness," wrote Robert Leeney, editor of the *New Haven* (Conn.) *Register.*

W. F. Childress, Editor and Vice President of the *Knoxville* (Tenn.) *Journal*, agreed, writing "advocacy journalism deserves most blame." Ed N. Wishcamper, editor of the *Abilene* (Tex.) *Reporter-News*, cited the "biased coverage of Vietnam War" as leading the decline of journalistic standards. Finally, the "youth culture," described as the "anti-establishment movement" was blamed by Marcus B. George, editor of the *Arkansas Democrat*, Little Rock, Ark.

While still concerned with accuracy and fairness, the next question was more specific:

7. Has the extension of the *Times* doctrine caused the nation's daily newspapers to be less careful in checking the authenticity of controversial stories?

	Number	*Percent*
YES	12	10
NO	109	88
OTHER	3	2
Total	124	100

Typical of the tone of the majority responses was the comment that: "Newspapermen are newspapermen, not lawyers. Newspapermen check. They don't run risks as selfstyled sidewalk lawyers."—Warren Lerude, Executive Editor, *Reno Evening Gazette* and *Nevada State Journal*.

The next question was aimed closer to home, and the predictable response was overwhelming.

8. Has the extension of the *Times* doctrine caused *your* newspaper to be less careful in checking the authenticity of controversial stories?

Of 130 editors responding, 128 replied with a resounding "no," and 2 answered with a hesitant "yes." Both of the confessors added a short explanation. One of them, editor of a Connecticut newspaper, said his publication had become less careful, but only to a "very slight degree." The other, a New Jersey editor, responded, "Yes, probably, but I hope not." Both had also been among the minority of editors who felt that newspapers in general had become less careful in checking the authenticity of stories. The New Jersey editor added two examples: "[Jack] Anderson on Eagleton!" and "[William F.] Buckley on phony Pentagon Papers."

Several editors among the majority who were opposed to the notion that their newspapers had become less careful added reasons for keeping confidence in their newsrooms. Perhaps fearful that reporters would unconsciously become more careless, Thomas W. Gerber, Editor of the *Concord* (N.H.) *Monitor*, wrote that "We have instructed staff to be more particularly alert to this possibility [carelessness] because of *Times*."

Most editors seemed to feel that their standards had not been affected in either direction by the *Times* to *Rosenbloom* protections.

"The Post-Dispatch as a rule has always been careful in checking the authenticity of controversial stories. We do not have libel insurance." —C. J. Prendergast, Jr., Executive City Editor, *St. Louis Post-Dispatch.*

"We want to have a reputation for fairness and accuracy as much as we ever did."—Brady Black, Editor, *Cincinnati Enquirer.*

Finally, the editors were asked if they were satisfied with the current state of the libel law. The majority clearly was pleased with the law as it now stands.

9. If you had the power to shape the law regarding libel, would you:

	Number	*Percent*
Leave the law unchanged	75	61.5
Abolish the libel law altogether	4	3.2
Make it more difficult to recover damages without abolishing the action	24	19.7
Make it less difficult to recover damages	7	5.7
Other	12	9.9
Total	122	100.0

Even more interesting than the bare statistics are the editors' comments concerning the current state of the law and why they would prefer to change it, or why it should remain intact. Even some of those who did not opt for making it more difficult to recover damages would impose sanctions against a losing plaintiff. One of those editors, falling into the "other" category, wrote:

> Require those who file libel suits to pay all expenses in cases they lose. Too many libel suits are filed largely to "muzzle" the press or "scare" the press off certain stories . . . . [A] threatened libel suit is almost as feared as one actually filed. It's worse than a threat of physical harm.—Marcus B. George, Editor, *Arkansas Democrat.*

Likewise, another editor would require losing plaintiffs to "pay all costs for both sides."—Vincent Dwyer, Editor, *Rocky Mountain* (Colo.) *News.*

The editors differed in their opinions as to the effect of the size of the newspaper on libel suits. On the one hand, there was a suggestion to "[i]nstitute safeguards against frivolous suits which tend to intimidate the owners of smaller newspapers."—Barney Waters, Editor, *Yonkers* (N.Y.) *Herald Statesman.* On the other hand, one editor thought that small, financially weak newspapers were free to defame with impunity.

To him, there is "[s]omething wrong when the chance of libel suit depends on assets of defendant and a publication with little or no assets can print about what it chooses."—Arthur Gallagher, *Ann Arbor* (Mich.) *News*.

1. LEAVE THE LAW INTACT

By far, however, the majority would leave the law unchanged. Asked how best to balance newspapers' first amendment rights with protection of an individual's reputation, most thought the current law was adequate.

> The law as presently written provides an adequate framework in which to reconcile various conflicting rights and to prevent excesses.—John Hughes, Editor, *Christian Science Monitor*.
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> * * *
>
> Maliciousness is the key . . . and my feeling is that there virtually is little of that left in newspapering these days. Professional standards have improved sharply.—Thomas E. Fallon, Editor, *Bay City* (Mich.) *Times*.
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> * * *
>
> In my judgment, private citizens are well protected. Public figures are not, and should not be. The "excesses" are much less than they used to be. Few newspapers rival the scandal sheets of 30 and 40 years ago. Most libel cases develop out of very minor typographical errors, or the missing of one fact in a story that has 200 facts in it. Seldom is there gross negligence amounting to malice, and almost never is there malice in the conventional sense of the word.—Robert C. Achorn, Editor, *Worcester* (Mass.) *Telegram and Gazette*.
>
> * * *
>
> The "actual malice" provision of the law today is enough, in my estimation, to prevent reckless publication, which is what newspapers ought to avoid.—Frederick Taylor, Managing Editor, *The Wall Street Journal*.

2. LAW DOESN'T NEED CHANGING, BUT SOME NEWSPAPERS DO

Even some editors who were pleased with the current state of the law felt that newspapers should do some housecleaning in order to live up to the ideals which warrant first amendment protection. They seemed convinced that newspapers plagued with libel suits brought the trouble upon themselves with inaccurate reporting.

> The journalistic organizations should do more to promote the fairness doctrine as it applies to the general public. Equal play brings respect for newspapers. Unequal play causes a loss of respect.—Walter G. Cowan, Editor, *New Orleans States-Item*.
>
> * * *
>
> I regard *Times v. Sullivan* as a useful decision for public

interest. It's key language—"reckless disregard for the truth"—might encourage laxity by reporters and editors but not likely. Any paper that winks at checking for accuracy is courting well-deserved trouble.—William Reddell, Editorial Page Editor, *San Antonio* (Tex.) *Express and News.*

* * *

The chief protection is the circulation list. Most papers which have failed have deserved to, or have lost circulation because of irresponsibility.—Mark Ethridge, Jr., Editor, *Detroit Free Press.*

* * *

No changes in the law [are necessary]. Improvement in objective reporting would help by making newspapers more believable.—E. A. Fitzhugh, Editor, *The Phoenix* (Ariz.) *Gazette.*

* * *

More attention [is] needed to the *gathering* of news. Responsibility of reporter sometimes leaves much to be desired. Abuse of our responsibilities and privileges leads to more restrictions.—Donald Goodenow, Managing Editor, *Los Angeles Herald-Examiner.*

3. LEAVE SUBSTANTIVE LAW UNCHANGED, BUT MAKE PROCEDURAL CHANGES IN FAVOR OF THE PRESS

Several editors suggested that procedural changes be made in libel actions. These proposals were similar to those made by editors who approved of the current law but would nonetheless impose financial sanctions against losing plaintiffs.

At least one editor was convinced that jurors could not properly follow a judge's instructions on the "actual malice" standard for establishing liability. Therefore he would "have libel actions heard by judges knowledgeable of libel laws. Many juries reach erroneous verdicts, only to be overturned on appeal, but after the costly appellate process."—Raymond Mariotti, Managing Editor, *Palm Beach* (Fla.) *Post.*

Another editor would simply "require that notice of the action be filed within three months after publication date."—L. D. McAlister, Managing Editor, *The Atlanta Journal.*

Many editors who approved of the "actual malice" standard would nonetheless make one significant change in the measure of damages.

"Abolish punitive damages, and make the plaintiff prove actual damages . . . ."—Sylvan Meyer, Editor, *The Miami* (Fla.) *News.*

This suggestion, echoed by several editors, might have the greatest impact on discouraging libel actions from being filed. Actual damages for defamation of character are frequently nominal, or at least insubstantial when compared to punitive damages which are virtually unlimited. In the *Rosenbloom* case, for example, the jury returned verdicts

in favor of the plaintiff of $25,000 actual damages and $725,000 punitive damages.[34]

4. THE SUPREME COURT HAS GONE 'TOO FAR.' MAKE IT LESS DIFFICULT TO RECOVER DAMAGES

Only seven of the responding editors—5.7%—would have the courts make it easier to recover damages for libel.[35] Their reasons are nonetheless interesting and bear scrutiny here, even though it is clear that they make up only a small minority of the editors' opinions. One of the few disapproving editors would overturn the *Rosenbloom* decision on the ground that it allows the press to make an otherwise private citizen a "public figure" unprotected by libel laws: "A private person who has not INVITED public attention . . . [should be] entitled to actual damages without proof of actual malice, if dragged into opprobrium."—Charles L. Dancey, Editor, *Peoria* (Ill.) *Journal Star.*

Others would reverse the trend freeing the press from libel, even where public figures are involved. These few editors expressed dissatisfaction with the "actual malice" standard of *Times* as well as the extensions of that case as seen in *Rosenbloom.*

> I can't prove it, but my feeling is that the Times decision . . . goes much too far in the direction of protecting the press from sloppy, reckless publication. I probably would welcome having its protection at one time or another, but we try to operate this newspaper as if it had never been rendered. That is, we try to be accurate, fair and truthful.—Donald J. Sterling, Jr., Editor, *Oregon Journal.*
>
> * * *
>
> I think public figures are entitled to the same protections against defamation as anyone else, though not . . . for privacy. —Jim Fain, Editor, *Dayton* (Ohio) *Daily News.*
>
> * * *
>
> I feel that it has become too easy to libel public figures. You should be right in the first place, or believe you are right, and I don't think they should be regarded as fair game.—William G. Sumner, Editor, *St. Paul* (Minn.) *Dispatch and Pioneer Press.*

5. NONJUDICIAL REMEDIES—PRESS COUNCILS ARE NEEDED

Finally there existed a small corps of editors who suggested other remedies for the defamed individual. Some would, in effect, abolish the libel action altogether and replace it with another, non-judicial remedies.

34. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40 (1971). The district court reduced the punitive damages to a still sizable $250,000 on remittitur. See note 27, *supra.*

35. See compiled statistics at p. 20.

> I would eliminate all monetary damages, but retain a libel law that required only that an injured party be guaranteed a retraction or redress given the same play, length and importance as the article or picture that gave offense. Instead of a court trial, I would have the law stipulate that such cases would be decided by a panel of three judges sitting without a jury to hear evidence . . . [E]mphasis should be shifted from monetary damages to retractions and redress, when merited. Present libel laws have stilted, muzzled, frightened the press into silence when it should be courageously smelling out rot.—Louis R. Guzzo, Executive Editor, *Seattle Post-Intelligencer.*
>
> * * *
>
> Newspapers ultimately are going to have to adopt some form of self-policing system, such as a press council, with a scheme for informing offending newspaper's readers it has been reprimanded, or results of investigation communicated.—Thomas W. Gerber, Editor, *Concord* (N.H.) *Monitor.*

Another editor suggested a panel that would serve as a sort of clearing house for libel claims that might later be filed in a normal tort action.

> Though I have no perfect solution, I have always considered the possibilities of a libel board, free of legal jurisdiction, which might first discuss all cases brought in front of it . . . . I would certainly feel that in cases where suits are justified, the publicizing of findings of a non-partisan board, which would investigate the alleged story, would result in giving redress to the victim of the story. In the same manner, the victim could then proceed with a real damage suit.—Paul M. Brunn II, Co-Publisher, *Miami Beach* (Fla.) *Sun Reporter.*

B. *The Equities Lie With the Press*

Finally, two thoughtful responses from editors at opposite ends of the country reflected the perplexing nature of balancing precious first amendment rights against the rights of the individual who finds himself at the mercy of an over-anxious, careless, or even vicious editor. One wrote about "mixed emotions," the other about a "vague uneasiness" with the trend in the law.

> I am not dissatisfied with the Court decisions, although I don't think I am as willing as the late Justice Black to go all the way to absolutism in interpreting the First Amendment. I have a vague uneasiness that private citizens may not have sufficient protection now . . . . [I]t has become virtually impossible to libel a public official. But I don't think the danger has ever been so much in terms of public officials as in terms of defamation of private citizens, people without extensive recourse (financial and otherwise) to the law or other media for response. I am concerned about their situation in the light of current interpretation, but I confess I don't know what to do about it. I don't

know whether remedy, if there can be remedy, lies in new legislation or, perhaps, in something like community press councils. —Norman A. Cherniss, Executive Editor, *Riverside* (Calif.) *Press-Enterprise.*

* * *

I have mixed emotions about changes in the law regarding newspaper first amendment rights, or rather, passing laws spelling out those rights. I would rather stick to the broad, basic right in the first amendment, instead of trying to define it narrowly by statute. I believe the only real protection of citizens from press excesses must be found in the conscience of the editor and publisher.—Herbert O'Keef, Editor, *The Raleigh* (N.C.) *Times.*

While many press critics would doubtless be unwilling to let the matter rest in the good conscience of the editor, there is practical wisdom in the observation. For if a newspaper defames an individual—be he public or private figure, and be it with malice or simple negligence—no award of monetary damages will likely restore the shattered reputation. The recovery may, however, deter other newspapers from pursuing investigative articles which denigrate an individual's character, even when the account may be correct, proper and newsworthy. All of which brings the matter back to the Court's desire to give the press the "breathing space"[36] it needs to remain vigorous as well as free. This is so because first amendment freedoms are considered the foundation of the Constitution, and therefore deserving of the highest protection. The constitutional guarantee of a free press, wrote Judge Learned Hand, includes "dissemination of news from as many different sources and with as many different facets and colors as is possible."[37] The *Times* to *Rosenbloom* cases are intended to insure that the colors do not pale—that editors do not grow timid because of threatened or real libel suits.

Balancing these sacred first amendment rights against the often immeasurable harm occasioned by defamation is a complex dilemma incapable of a completely equitable solution. But as the Court implied throughout the *Times* to *Rosenbloom* movement, the equities lie with the press. Perhaps that is what James Madison meant when, in lamenting the excesses committed by a free press, he observed that "the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied . . . ."[38] The Supreme Court has clearly chosen to protect the good, even at the expense of likewise shielding the concomitant evil. Not surprisingly, a majority of editors agree that the Court has taken the proper path. In time, historians, rather than journalists, will be the final judges of the wisdom of the Court and the restraint of the press.

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36. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964), *quoting* N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

37. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

38. See note 28, *supra.*

III. APPENDIX

The Appendix includes:
A. Text of the letter sent to each of the editors surveyed; and
B. Text of the survey questionnaire.

* * *

A. *Explanatory Letter*

Dear _____:

The *University of Miami Law Review* is preparing an article on the effects of the Supreme Court's extension of the *New York Times* doctrine as a constitutional defense to the action for libel.

As you know, the Court has expanded freedom from libel suits beginning with *New York Times v. Sullivan* in 1964 and continuing through *Rosenbloom v. Metromedia* in 1971. The current rule of law can be summarized in this way:

> A newspaper's false account of any matter of public interest is constitutionally privileged by the First Amendment so that a plaintiff in a libel action must prove "actual malice" of the publisher in order to recover damages.

I am a former newspaper reporter (The Miami Herald) and am currently the author of two legal columns appearing in various Florida newspapers. I am also a senior at the University of Miami School of Law and will be preparing the article on libel for the *Law Review*.

I request your aid so that the *Law Review* may compile empirical data on the effects of the *Times* extensions. Your answers to the enclosed questionnaire will remain confidential and will be filed in the offices of the *Law Review*. You may, however, wish to make additional comments intended for publication and attribution.

Thank you for taking time from your deadline-filled day to aid in this project of empirical legal research.

Sincerely,
Paul J. Levine
Research and Digest Editor

B. *Questionnaire*

1. Has your newspaper's coverage of controversial local issues (e.g., investigative stories of corruption, etc.) increased in the past 5 to 8 years?

   YES _____ NO _____

   (a) If the answer above is yes, has the expansion of the *Times* doctrine, i.e., more freedom from libel, contributed to the increased coverage?

(1) NO
(2) YES, TO A SMALL DEGREE
(3) YES, TO A MODERATE DEGREE
(4) YES, TO A GREAT DEGREE
(5) OTHER _____

(b) In your opinion, has the extension of the *Times* doctrine caused the nation's daily newspapers, in general, to tackle more controversial stories, such as exposes of officials or corrupt business practices, etc.?

YES _____ NO _____

OTHER _____

2. Does your newspaper "clear" controversial stories through an attorney before publication?

(1) NEVER
(2) RARELY
(3) OFTEN
(4) IN EVERY CASE IN WHICH THERE IS A POSSIBILITY OF LIBEL
(5) OTHER _____

(a) Can you estimate the number of times a libel attorney has been consulted with regard to "controversial" stories prior to publication in the last 12 months?

(1) 0
(2) 1-6
(3) 7-12
(4) 13-24
(5) MORE THAN 24
(6) OTHER _____

3. Has the number of times your newspaper consulted a libel attorney prior to publication:

(1) REMAINED ABOUT THE SAME IN THE LAST 5-8 YEARS.
(2) INCREASED IN THE LAST 5-8 YEARS.
(3) DECREASED IN THE LAST 5-8 YEARS.
(4) OTHER _____

(a) If the consultations with the attorney have decreased in the past 5-8 years, has the extension of the *Times* doctrine contributed to that decrease?

YES _____ NO _____

OTHER _____

QUESTIONS 4, 4a, and 5 DEAL WITH NEWSPAPERS *IN GENERAL*, RATHER THAN WITH YOUR NEWSPAPER.

4. In your opinion, have the journalistic standards of accuracy and fairness in the nation's daily newspapers:

(1) *IMPROVED* IN THE LAST 5-8 YEARS.
(2) REMAINED ABOUT THE *SAME* IN THE LAST 5-8 YEARS.
(3) *LESSENED* IN THE LAST 5-8 YEARS.
(4) OTHER _____

(a) If the answer above was (3), is this the result of the extension of the *Times* doctrine?

YES _____ NO _____

OTHER _____

5. In your opinion, has the extension of the *Times* doctrine caused the nation's daily newspapers to be less careful in checking the authenticity of controversial stories?
YES _____ NO _____
OTHER _____

6. Has the extension of the *Times* doctrine caused *your* newspaper to be less careful in checking the authenticity of controversial stories?

YES _____ NO _____

OTHER _____

7. If you had the power to shape the law regarding libel, would you:

(1) LEAVE THE LAW UNCHANGED.
(2) ABOLISH THE LIBEL LAW ALTOGETHER.
(3) MAKE IT MORE DIFFICULT TO RECOVER DAMAGES FOR DEFAMATION, WITHOUT ABOLISHING THE ACTION.
(4) MAKE IT LESS DIFFICULT TO RECOVER DAMAGES.
(5) OTHER _____

OPTIONAL

8. In the past 24 months, how many libel actions were filed against your newspaper? _____

(a) Of that number, how many:

(1) WERE SETTLED PRIOR TO OR DURING TRIAL ____
(2) RESULTED IN JUDGMENTS FOR THE NEWSPAPER, (including plaintiff's judgments reversed on appeal) _____
(3) RESULTED IN JUDGMENTS FOR PLAINTIFF ____
(4) OTHER _____

9. Do you have any suggestions for changes in the law which would guarantee newspapers their First Amendment freedoms but would also protect private citizens from the excesses which some newspapers have committed?

_____

10. Do you have any further comments on the libel suit in general?

MAY THE LAW REVIEW HAVE YOUR PERMISSION TO ATTRIBUTE THE ANSWERS TO NUMBERS 9 AND 10 TO YOU?

YES _____ NO _____