No. 132P18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

BETH DESMOND, Plaintiff-Appellee, v. THE NEWS AND OBSERVER PUBLISHING COMPANY and MANDY LOCKE, Defendants-Appellants	)	From Wake County No. COA 18-411

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BRIEF OF *AMICI CURIAE*

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

No. 132P18-2

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BETH DESMOND, Plaintiff-Appellee, v. THE NEWS AND OBSERVER PUBLISHING COMPANY and MANDY LOCKE, Defendants-Appellants	)	From North Carolina Court of Appeals COA No. 18-411

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BRIEF OF *AMICI CURIAE*

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The *amici* listed below, through their counsel and pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure and their accompanying Motion for Leave to File Brief of *Amici Curiae*, hereby submit this brief in support of The News & Observer Publishing Company and Mandy Locke (collectively, the "Newspaper Defendants").[1]

Amici are the Reporters Committee for Freedom of the Press, ABC, Inc., American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, Boston Globe Media Partners, LLC, Capitol

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[1] No person or entity—other than *amici curiae*, their members, or their counsel—directly or indirectly wrote this brief or contributed money for its preparation. N.C. R. App. P. 28(i)(2).

Broadcasting Co., CBS Broadcasting Inc., Gannett Co., Inc., GateHouse Media, LLC, Knight Science Journalism Program, The Media Institute, Media Law Resource Center, MIT Graduate Program in Science Writing, National Press Club Journalism Institute, National Press Photographers Association, The New York Times Company, North Carolina Association of Broadcasters, North Carolina Press Association, Online News Association, The Pilot, POLITICO LLC, Radio Television Digital News Association, Reporters Without Borders, Sinclair Broadcast Group, Inc., Society of Professional Journalists, Tribune Media Company, Undark Magazine, The Washington Post, and WBTV, LLC. A full description of *amici*'s respective interests in this case are set forth in the accompanying Motion for Leave to File Brief of *Amici Curiae*.

INTRODUCTION

At issue in this case is the proper application of the constitutional "actual malice" standard. This case arises out of an award-winning investigative series published by the Newspaper Defendants that delved into the work of the North Carolina State Bureau of Investigation ("SBI") and, more specifically, into alleged analytical and testimonial errors by plaintiff Desmond, a forensic firearms examiner employed by the SBI Crime Lab. Forensic science often plays a central role in modern-era criminal cases. Accordingly, reporting about forensic science, including potential errors or misconduct by scientists or laboratories, fosters accountability and public understanding of a key feature of the criminal justice system. Even when allegations of error or wrongdoing turn out to be incorrect, press coverage of these issues can highlight ongoing controversies within the judicial system and allows the public to evaluate such claims. If the press is chilled from reporting on such issues by fear of unwarranted defamation liability, the public will lose access to valuable information.

Recognizing the need for robust protection for reporting on the actions of public officials, the U.S. Supreme Court established the actual malice standard, which—when properly applied—allows the news media to report on public officials without fear of unwarranted liability. The standard requires public official and public figure defamation plaintiffs: (1) to prove the alleged defamation is not substantially true, and (2) to prove by clear and convincing evidence that the defendant made the defamatory statement with either knowledge of its falsity or with reckless disregard for the truth. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The actual malice standard prevents the threat of liability from "dampen[ing] the vigor and limit[ing] the variety of public debate" on issues related to government. *Id*. at 279. Put another way, it provides needed breathing space for speech critical of public officials—speech that is vital to the public's ability to hold government to account. *Id*.

In this case, the Court of Appeals upheld the trial court's misapplication of the actual malice standard, leading to a multi-million dollar verdict that will surely chill future reporting on government activity—exactly the type of speech the First Amendment and the actual malice standard were designed to protect. As a result, those analyzing and questioning the actions of public officials will likely "steer far wider of the unlawful zone," avoiding the publication of even truthful speech that might subject them to a devastating jury verdict. *Id*. North Carolinians will thus suffer from reduced access to information about public officials' actions. This Court should enter a judgment in the Newspaper

Defendants' favor on the basis that there is no triable issue of fact on the question of actual malice, or in the alternative, order a new trial.

ARGUMENT

I. JOURNALISTS MUST BE ABLE TO REPORT ON ALLEGATIONS OF MISTAKES, MISCONDUCT, OR ABUSE BY PUBLIC OFFICIALS WITHOUT FEAR OF UNWARRANTED DEFAMATION LIABILITY.

Courts have long recognized that it is the responsibility of the news media to inform the public about issues of public concern. *See Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). This is especially true when it comes to oversight of government officials. *See Sullivan*, 376 U.S. at 280. If journalists are to fulfill their constitutionally recognized role in our democracy, they must be able to fairly and accurately report on their understanding of allegations of errors or wrongdoing by government officials without fear of defamation liability.[2]

The news media have long served as a watchdog for the public with respect to the criminal justice system in particular, *see Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966), including the role played by forensic science. News reports have brought to light many potential issues with crime lab techniques. For example, in 2012, *The Washington Post* reported on allegations that microscopic hair analysis conducted by the FBI was inaccurate and may have led to hundreds of wrongful convictions. Spencer S. Hsu,

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[2] "Congress shall make no law . . . abridging the freedom of speech, or of the press." Const. amend. I.

Convicted defendants left uninformed of forensic flaws found by Justice Dept., Wash. Post (Apr. 16, 2012), https://perma.cc/SJZ8-NVGX. In one instance, DNA testing revealed that a hair that had been labeled as a human hair in a murder prosecution was in fact a canine hair. *Id*. After this and other reporting, the FBI launched a review of hair analysis, which ultimately found that the FBI lab's microscopic hair comparison unit overstated the reliability of hair analysis matches in more than 95 percent of court cases. Spencer S. Hsu, *FBI admits flaws in hair analysis over decades*, Wash. Post (Apr. 18, 2015), https://perma.cc/GSE9-WBF7.

At times, controversies within forensic science implicate particular scientists or particular labs, and revelation of these deficiencies falls squarely within the public interest. For example, in 2017, the government dismissed more than 20,000 convictions in Massachusetts after investigations showed state chemist Annie Dookhan had tampered with evidence and faked test results. Jon Schuppe, *Epic Drug Lab Scandal Results in More Than 20,000 Convictions Dropped*, NBC News (Apr. 18, 2017), https://perma.cc/3AEL-N3H8. In another instance, probes into the 1991 case of Cameron Willingham, who was convicted of murder and later executed, called into question the arson investigation techniques used by Manuel Vasquez, the deputy fire marshal who investigated the matter. *See, e.g.,* David Grann, *Trial by Fire*, The New Yorker (Aug. 31, 2009), https://perma.cc/K3HL-VC2V. In 2010, the Texas Forensic Science Commission concluded that the arson evidence presented by Vasquez upon which Willingham's conviction was based was "flawed science." Allan Turner, *'Flawed science' cited in arson case leading to execution*, Houston Chron. (July 23, 2010), https://bit.ly/2Ghd3JM. Just last year, after an investigation by ProPublica and New York Times Magazine, a retired detective admitted that his blood spatter analysis techniques that led to a murder conviction in 1980 "were wrong." Pamela Colloff, *Blood-Spatter Expert in Joe Bryan Case Says "My Conclusions Were Wrong"*, ProPublica (Sept. 17, 2018), https://perma.cc/ZDP6-FTAX.

Allegations of errors or falsification of forensic science methods in crime labs or by forensic examiners may be the subject of an ongoing dispute at the time the news media covers them. For example, in January 2019, ProPublica reported on studies calling into question FBI photo analysis techniques. Ryan Gabrielson, *The FBI Says Its Photo Analysis Is Scientific Evidence. Scientists Disagree.*, ProPublica (Jan. 17, 2019), https://perma.cc/6J35-3HFQ. The article recounts one instance in which a man was convicted of bank robbery based in part on testimony by an FBI image examiner that a plaid pattern on a shirt worn by a bank robber, as seen in security footage, matched one found at the man's home. *Id*. The FBI image examiner claimed there was only a 1 in 650 billion chance that another shirt would match the one photographed by bank security cameras. *Id*. However, statisticians told ProPublica that this statistic cannot be correct because no database of different plaid patterns exists that would make this statistic discernable. *Id*. The FBI responded that it stands by its image analysis techniques, and its examiners testify about image analysis evidence "in hundreds of cases a year." *Id.* Regardless of whether it is the FBI or the statisticians interviewed by ProPublica who are correct on this issue, this type of reporting on ongoing forensic science controversies—

and the debate and discussion it sparks—is important to public understanding of our criminal justice system.

The forensic method at issue in this case, bullet analysis, has also been the subject of critical studies and investigative reporting. In 2012, a National Academy of Sciences panel chartered by Congress found that many forensic methods, including bullet analysis, are susceptible to human error. Spencer S. Hsu, *Forensic techniques are subject to human bias, lack standards, panel found*, Wash. Post (Apr. 17, 2012), https://perma.cc/Y83P-5AGH. In 2016, a council commissioned by the White House found serious weaknesses in many of the same techniques implicated by the 2012 panel, including methods used to identify firearms. *See* Christopher Zoukis, *Presidential Commission Criticizes Some Forensic Methods*, Huffington Post (Oct. 3, 2016), https://perma.cc/7YKK-C5BD.

In sum, journalists' reporting on controversies and disputes within forensic science fosters public awareness and understanding of the criminal justice system. Many of these cited articles have brought to light disputes over the validity of scientific methods or the work of individual analysts. Fear of unwarranted defamation liability will make the news media less likely to report on these complicated issues, and the public will therefore lose the benefit of valuable information about our law enforcement and criminal justice systems.

II. THIS COURT SHOULD REVERSE THE DECISION BELOW BECAUSE THE COURT OF APPEALS MISINTERPRETED THE LAW OF ACTUAL MALICE.

Recognizing "that 'breathing space' [is] essential to [the] fruitful exercise" of First Amendment rights, *Gertz v. Welch*, 418 U.S. 323, 342 (1974) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)), the U.S. Supreme Court established the actual malice standard for defamation claims brought by public official plaintiffs. *Sullivan*, 376 U.S. at 280. Specifically, public officials may recover for defamation only if they prove a substantially false statement was made either with knowledge of its falsity or reckless disregard for its truth or falsity. *Id*. This standard harmonizes defamation law with the First Amendment, honoring the bedrock freedom of speech principle that democracy flourishes in an environment in which "debate on public issues [is] uninhibited, robust, and wide-open, and [ ] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id*. at 270.

In holding that Desmond had demonstrated actual malice, the Court of Appeals erred in three respects.

First, it failed to conduct an independent review of the record to determine that plaintiff had established actual malice with convincing clarity. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514 (1984).

Second, it misinterpreted the actual malice standard by not requiring Desmond to prove that the Newspaper Defendants knew the published statements were false or had serious doubts about their veracity. *See Desmond v. News & Observer Publ'g Co.*, __ N.C. App. __, 823 S.E.2d 412, 431 (2018).

Third, it erred by rejecting the Newspaper Defendants' argument that: (a) their interpretation of information provided by forensic firearms experts was a "rational interpretation" as a matter of law, and (b) therefore, there was insufficient evidence of actual malice. *See Time, Inc. v. Pape*, 401 U.S. 279, 279 (1971); *Bowser v. Durham Herald Co.*, 181 N.C. App. 339, 342, 638 S.E.2d 614, 616 (2007).

A. <u>The Court of Appeals failed to conduct an independent review of the record as the First Amendment requires.</u>

The U.S. Supreme Court has repeatedly held "that in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record[.]'" *Bose Corp.*, 466 U.S. at 499 (quoting *Sullivan*, 376 U.S. at 284–86).[3] This requirement of independent appellate review is "a rule of federal constitutional law." *Id*. at 510. Accordingly, in defamation actions, "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." *Id*. at 511; *see also Doe v. Doe*, __ N.C. App. __, 823 S.E.2d 583, 589-90 (2018) (identifying *de novo* review as the appropriate standard for appellate courts considering constitutional issues). This independent review is not an inquiry as to whether a reasonable person could find actual malice, but requires the appellate court itself to conclude that the facts demonstrate actual malice with convincing clarity. *See* Eldred, *supra*, 47 Fordham L. Rev. at 590.

The Supreme Court decided *Bose* against a historical backdrop in which, although the actual malice standard had been recognized two decades before in *Sullivan*, eight out of ten libel juries were finding for the plaintiff. Bruce W. Sanford, *Libel and Privacy* § 1.3

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[3] Even prior to its decision in *Bose*, the Supreme Court had multiple times applied independent review to defamation cases before explicitly requiring it as a matter of constitutional law. *See* Tigran W. Eldred, *Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Person Defamation Cases*, 47 Fordham L. Rev. 579, 580, n.11 (1989) (collecting cases).

(2006). Following *Sullivan*, numerous cases resulted in multi-million dollar verdicts against defamation defendants, similar to the jury verdict in this matter. *Id*. In many of these cases, it was apparent that juries did not understand the actual malice standard, and instead were applying general notions of "fairness" to determine who should prevail. *Id*. Thus, the Supreme Court ensured the exacting constitutional standards of *Sullivan* were followed in defamation cases by clarifying that appellate courts should apply *de novo* independent review. *Bose Corp*., 466 U.S. at 499. This independent review, the Court emphasized, protects "the common quest for truth and the vitality of society as a whole" by ensuring First Amendment values are recognized in defamation cases. *Id*. at 503–04. After *Bose*, appellate courts applying independent review reversed verdicts against media defendants roughly twice as often as those appellate courts not applying the proper standard. *Ten Years of "Independent Appellate Review" in Defamation Cases from* Bose *to* Connaughton *to the Present*, Libel Defense Resource Center Bulletin, Apr. 30, 1994, at 1, 10.

Here, the Court of Appeals did not conduct the constitutionally required independent review. The court acknowledged it must "'consider the factual record in full'" and "'examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect.'" *Desmond*, 823 S.E.2d at 422–23 (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685–89 (1989)). Yet it instead analyzed the actual malice issue by viewing all of the evidence in the light most favorable to Desmond, citing a case reviewing a motion for judgment notwithstanding the verdict that did not involve a constitutional question. *Id*. at 421 (citing *Springs v. City of Charlotte*, 209 N.C. App. 271 (2011)).

This Court has never had occasion to apply *Bose* "independent review." However, many other courts, including other state supreme courts and the Fourth Circuit, have expounded upon the U.S. Supreme Court's determination in *Bose*. For example, the Supreme Court of Oklahoma has explained that "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law for the reviewing court[,]" and appellate judges must find the evidence sufficient only if it is "clear and convincing[.]" *Herbert v. Oklahoma Christian Coalition*, 1990 OK 90, 992 P.2d 322, 328 (1999) (holding that where a public official plaintiff pled defendant "misrepresented his voting record, failed to thoroughly research his votes, drew incorrect conclusions from its research, failed to contact him personally . . . and failed to identify that plaintiff's positions were not based upon surveys[,]" these pleadings were "insufficient to rise to the level of 'actual malice[.]'"). The California Supreme Court has similarly interpreted *Bose*, stating that "*Bose* makes plain that in cases involving the constitutional rule of *New York Times [v. Sullivan]*, those facts that are germane to the central question of actual malice must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact." *McCoy v. Hearst Corp.*, 42 Cal.3d 835, 842, 727 P.2d 711, 715 (1986). The California Supreme Court further held that an appellate court "may not restrict itself . . . to evidence favorable to the judgment" and "is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry." *Id*. at 845–46. Similarly, in *Snyder v. Phelps*, the Fourth Circuit acknowledged its obligation to apply the independent review standard in tort cases involving First Amendment issues, reviewing the district court's determination *de novo* and noting that the Supreme Court had referred to the review required by *Bose* as "enhanced appellate review." 580 F.3d 206, 218 (4th Cir. 2009) (internal quotations omitted), aff'd, 562 U.S. 443 (2011).

The Court of Appeals' decision in this case neither mentions *Bose* nor conducts the constitutionally mandated independent review recognized in that decision. By reviewing the evidence in the light most favorable to Desmond instead of reviewing it independently to determine if the record demonstrates, by clear and convincing evidence, actual malice, the Court of Appeals erred as a matter of law. As the Supreme Court has held: "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact[.]" *Bose*, 466 U.S. at 501. The Court of Appeals' failure to fulfill that constitutional responsibility is itself grounds for reversal. Its decision improperly ignores the principles established by *Bose* and substitutes an impermissible, weaker standard of review. Allowing this Court of Appeals decision to stand will undermine the critical role of judges in defamation actions in ensuring constitutional standards are upheld. *Id*. at 508 (explaining that independent appellate review is necessary to ensure that "'the judgment does not constitute a forbidden intrusion on the field of free expression'") (quoting *Sullivan*, 376 U.S. at 285).

B. <u>The Court of Appeals erred by not requiring Desmond to show that the Newspaper Defendants knew the statements at issue were false or had serious doubts about their truth.</u>

The Court of Appeals misapplied the actual malice standard by failing to require Desmond to prove by clear and convincing evidence that the Newspaper Defendants in fact knew the allegedly defamatory statements were false or harbored serious doubts about their truth, instead allowing Desmond to rely on evidence that does not demonstrate knowledge of falsity or serious doubts. *Desmond*, __ N.C. App. __, 823 S.E.2d at 430–31.

Desmond relied in part on a July 29, 2010 email written by News & Observer photographer Shawn Rocco to Locke as evidence of the Newspaper Defendants' purported bias. The Court of Appeals, again taking this evidence in the light most favorable to Desmond, determined this email "tended to show that the primary objective of defendants was sensationalism rather than truth." *Id*. at 431. However, as a number of courts have recognized, evidence of bias does not demonstrate knowledge of falsity or the harboring of serious doubts as to truth, and is therefore irrelevant to the question of actual malice. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 73–74 (1964) (declaring "constitutionally invalid" a Louisiana criminal defamation statute that took into account "ill-will" in matters involving defamation of a public official); *Greenbelt Coop Publ'g Ass'n v. Bresler*, 398 U.S. 6, 10 (1970) (calling an "error of constitutional magnitude" a trial court's defamation jury instruction, which "defined 'malice' to include 'spite, hostility or deliberate intention to harm'"); *Griffin v. Holden*, 180 N.C. App. 129, 137, 636 S.E.2d 298, 305 (2006) (stating that "personal hostility is not evidence of actual malice in the context of New York v. Sullivan"); *Varner v. Bryan*, 113 N.C. App 697, 704, 440 S.E.2d 295, 300 (1994) (noting that "evidence of personal hostility does not constitute evidence of 'actual malice' under the standard set forth in *New York Times Co. v. Sullivan*").[4]

The Court of Appeals' reliance on this evidence inappropriately conflated common law malice with constitutional actual malice. This Court has never had occasion to substantively address the issue of constitutional actual malice. However, decisions from other courts that explain the difference between common law malice—that is, spite, hatred, or ill will—and constitutional actual malice are instructive. For example, in *Lancaster v. Daily Banner-News Publishing Co.*, the Arkansas Supreme Court explained that, with regard to actual malice, "[i]t is immaterial that the writer is biased against the official, has ill will towards him, or intended to inflict harm upon him. The test is . . . reckless disregard for truth." 274 Ark. 145, 153, 622 S.W.2d 671 (1981); *see also Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991), *cert. denied*, 501 U.S. 1212 (1991); *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Tex. Ct. App. 1993). This Court should make clear that evidence of ill will is immaterial to the issue of constitutional actual malice.

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[4] Additionally, Rocco's attitude toward the SBI was appropriate for an investigative journalist, given the long history in American journalism of reporters taking a skeptical, aggressive approach toward those in power. *See, e.g.,* Ben Railton, *Considering History: Walter Cronkite, David Halberstam, and Two Legacies of Adversarial Journalism*, Saturday Evening Post, Feb. 27, 2018, http://perma.cc/Y4BA-RGVM (describing adversarial journalism practiced during the Vietnam War). Indeed, evidence that a reporter believes he is serving the public interest by unveiling abuses within government logically demonstrates belief in the truth of the statements, not knowledge of their falsity or serious doubts about their truth.

C. <u>The Court of Appeals erred by not finding as a matter of law that the Newspaper Defendants' interpretation of source information was a "rational interpretation" of what sources had said.</u>

Desmond also relied in part upon evidence that the Newspaper Defendants misunderstood information provided by several experts in firearms ballistics. The Court of Appeals, again ignoring the *de novo* review standard required by *Bose* and improperly analyzing the evidence in the light most favorable to Desmond, found these alleged misinterpretations to be evidence of actual malice. *Desmond*, 823 S.E.2d at 425–30. Misunderstandings, however, do not demonstrate actual malice. *See, e.g.*, *Profitt v. Greensboro News & Record, Inc.*, 91 N.C. App. 218, 228, 371 S.E.2d 292, 297 (1988) (affirming summary judgment for defendants for a lack of clear and convincing evidence of actual malice when the evidence suggested the reporter may have misunderstood plaintiff's comments). In fact, evidence that a reporter misunderstood source information refutes a finding of actual malice, as it shows the reporter subjectively believed the published information was true and did not seriously doubt its veracity.

The Court of Appeals has previously found that where a defamation defendant misunderstands a situation and therefore publishes false information, actual malice cannot be found. *Lewis v. Rapp*, 220 N.C.App. 299, 304, 725 S.E.2d 597, 601–02 (2012). In *Lewis*, an internet poster, mistakenly believing that a judicial candidate was actually a sitting judge, stated in an initial blog entry on April 9, 2010 that the judicial candidate had violated the Code of Judicial Conduct by endorsing another political candidate. *Id*. at 303–04. Noting that "it appears from all accounts that defendant believed that plaintiff was a sitting judge and not running for office," the Court of Appeals found that while the defendant may have acted negligently, his misunderstanding of the situation demonstrated that he did not act with actual malice. *Id*. (citing *St. Amant v. Thompson*, 390 U.S. 727, 729 (1968)).

Further, as explained by the U.S. Supreme Court in *Time, Inc. v. Pape*, the news media does not act with actual malice when it publishes information that is a "rational interpretation" of a large amount of source material. 401 U.S. at 290 ("The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under [*Sullivan*]."). Such determinations are for the court to make as a matter of law. *Bowser*, 181 N.C. App. at 342, 638 S.E.2d at 616.

The rational interpretation rule has been applied by the North Carolina Court of Appeals. *See id.* In *Bowser*, a county employee wrote a letter to county commissioners alleging that the plaintiff Joe Bowser—a county commissioner—had once walked her to her car, during which time he asked her multiple times for information about another county employee, raised his voice at her, and threatened her job. *Id*. The newspaper wrote that Bowser had "attempted to pressure" the state employee. *Id.* The Court of Appeals determined that this statement was a rational interpretation of the statements in the letter, demonstrating a lack of actual malice, and held that plaintiff could not recover "for choice of language which may reflect a misconception but is a rational interpretation of the material from a defendant's source." *Id*. Here, the Newspaper Defendants' article provided a rational interpretation of the information provided to Locke by the experts she interviewed, and, accordingly, was not published with actual malice. *See* Defs.-Appellants' New Br. Section I.B.

Assuming *arguendo* that Locke misunderstood her sources, no clear and convincing evidence shows that she or the News & Observer knew she had misunderstood them and published her erroneous interpretation despite that knowledge. Without proof of such knowledge or subjective intent, the Newspaper Defendants cannot be found to have acted with actual malice. Evidence of a misunderstanding does not demonstrate that the Newspaper Defendants had subjective knowledge that the statements at issue were false or harbored serious doubts as to the truth of the statements.

CONCLUSION

The Court of Appeals decision below, and specifically its misapplication of the actual malice standard, threatens important principles under North Carolina law and the First Amendment, and threatens to chill the fundamental public interest in "uninhibited, robust, and wide-open" debate about the conduct of public officials. For the reasons set forth above, *amici* respectfully urge this Court to vacate the judgment and remand for entry of judgment notwithstanding the verdict in Newspaper Defendants' favor or, alternatively, reverse the judgment entered on November 18, 2016 and remand this case to Superior Court for a new trial.

Respectfully submitted, this 29th day of April, 2019.

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CONTENTS OF APPENDIX

APPENDIX A

NEWS ARTICLES AND TREATISE CITED BY *AMICI CURIAE*

THE SATURDAY EVENING POST

February 27, 2018 | CONSIDERING HISTORY, HISTORY

Considering History: Walter Cronkite, David Halberstam, and Two Legacies of Adversarial Journalism

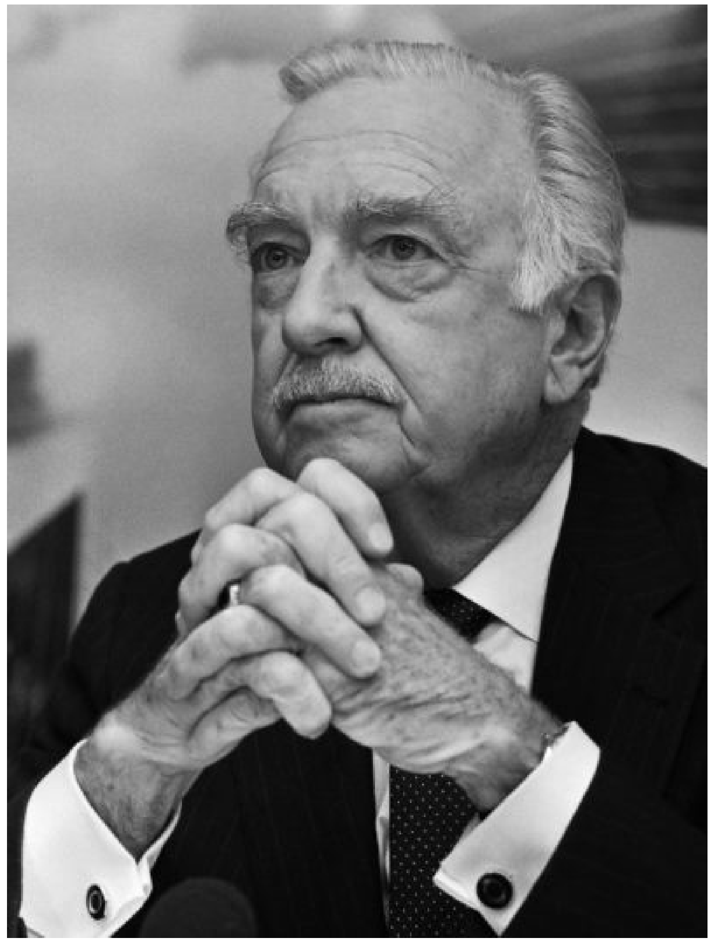
Fifty years ago, these journalists changed the way Americans viewed the Vietnam War.

Ben Railton

This series by American studies professor Ben Railton explores the connections between America's past and present.

Fifty years ago this evening, on February 27, 1968, legendary CBS News anchor Walter Cronkite concluded a special report on the ongoing conflict in Vietnam with a striking three-minute commentary. The special report had cast a long and searching look at the haphazard progress and challenges of the "police action" in Southeast Asia, but Cronkite's closing commentary went much further still.

Acknowledging that his "analysis must be speculative, personal, subjective," he nonetheless laid bare the stark realities of the situation in Vietnam: "For it seems now more certain than ever, that the bloody experience of Vietnam is to end in a stalemate. To say that we are closer to victory today is to believe in the face of the evidence, the optimists who have been wrong in the past."


Walter Cronkite (Wikimedia Commons)

Cronkite's sober realism wasn't just an overarching attempt to counter such optimistic narratives of the war–it was also quite specifically adversarial to the perspectives coming out of the American military and political leadership. "With as much restraint as I could," Cronkite narrated, "I turned to our own leaders whose idea of negotiation seemed frozen in memories of General McArthur's encounter with the Japanese aboard the Battleship Missouri. … We've been too often disappointed by the optimism of the American leaders." As he so often did, Cronkite presented this adversarial stance in a restrained and civil way, a tone befitting his role as an elder statesman of American journalism. But his opposition to the narratives coming out of Washington was clear and crucial nonetheless.

That restrained, civil, and statesmanlike form of rebuke could be called public adversarial journalism, and was a key facet of Cronkite's voice and role throughout his decades on the air. It had the ability to shift national conversations in a gentle but very real way, framing a new way of understanding unfolding histories and issues for both Cronkite's listeners and the powerful figures to whom he was speaking his truths. Building on the legacy of influential predecessors like Edward R. Murrow, and making this critical tone a more consistent part of his efforts as anchor than any of his contemporaries, Cronkite's public adversarial journalism became a vital component of the television news landscape throughout the 1960s and 70s.


David Halberstam in 1978. (William H. Mortimer, Wikimedia Commons)

Yet while such public adversarial journalism has vital roles to play in changing national conversations by speaking uncomfortable truths, it is not necessarily as well-equipped for investigating and uncovering such truths. For that, a more private adversarial journalism is needed, one that confronts leaders and spin artists directly, calls them out on their partial or false representations, and works to find the truth that lies behind them. In the same period as Cronkite's public stance on the Vietnam War, a young investigative journalist named David Halberstam modeled this form of private adversarial journalism, helping shift the relationship of war journalists to the military effort in the process.

Halberstam told the story of his most striking and inspiring moment of private adversarial journalism in a 2005 speech to the Columbia School of Journalism:

> Probably the moment I am proudest of in my career is this: By the fall of 1963, I was one of a small group of reporters in Saigon– we had enraged Washington and Saigon by filing pessimistic dispatches on the war. In particular, my young colleague, Neil Sheehan, and I were considered the enemy. The president of the United States, JFK, had already asked the publisher to pull me.
>
> One day that fall, there was a major battle in the Delta (the Americans were not yet in a full combat role; they were in an advising and support role). MACV–the American military command– tried to keep out all reporters so they could

> control the information. Neil and I spent the day pushing hard to get there–calling everyone, including Ambassador Henry Cabot Lodge and General Paul Harkins. With no luck, of course.
>
> In those days, the military had a daily late afternoon briefing given by a major or a captain, called the Five O'clock Follies, because of the generally low value of the information.
>
> On this particular day, the briefing was different, given not by a ajor but by a major general, Dick Stilwell, the smoothest young general in Saigon. It was in a different room and every general and every bird colonel in the country was there. Picture if you will rather small room, about the size of a classroom, with about 10 or 12 reporters there in the center of the room. And in the back, and outside, some 40 military officers, all of them big time brass. It was clearly an attempt to intimidate us.
>
> General Stilwell tried to take the intimidation a step further. He began by saying that Neil and I had bothered General Harkins and Ambassador Lodge and other VIPs, and we were not to do it again. Period.
>
> And I stood up, my heart beating wildly–and told him that we were not his corporals or privates, that we worked for *The New York Times* and UP and AP and *Newsweek*, not for the Department of Defense.
>
> I said that we knew that 30 American helicopters and perhaps 150 American soldiers had gone into battle, and the American people had a right to know what happened.

Through this and many other moments of private adversarial journalism, Halberstam and colleagues like Sheehan were able to uncover the truth of what was happening with US forces and efforts in Vietnam–a truth that became a crucial influence on shifting the perspectives on the war of public journalists and figures like Cronkite.

While they differ in tone, role, and other specifics, Cronkite's and Halberstam's public and private adversarial journalism are ultimately complementary, each a necessary part of a journalistic enterprise that pursues truth and presents it to its audiences and society. The legacies of both these men and moments remain vital models for American journalism.

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§ 1.3 APRIL 1984

By the time the twentieth anniversary of the *New York Times* decision rolled around three years later, it was not at all clear that there was much to celebrate. Statistics from the media-funded Libel Defense Resource Center indicated that eight out of ten libel plaintiffs were winning libel trials, and while three out of four of those plaintiffs' verdicts were reversed or reduced on appeal as unsupported by competent evidence, more libel cases were proceeding, expensively and cumbersomely, to trial.

The new bumper crop of plaintiffs included some celebrities or public officials using the libel lawsuit as a political weapon or public relations tool. Then, too, there were some misguided fortune hunters, determined to parlay feeble or nonexistent claims into rainbow-end riches by trying to inflame a jury's anti-news media bias. Mega-verdicts against the press mounted: $9.2 million against the small *Alton* (Illinois) *Telegraph*[11]; $4.5 million against the *Philadelphia Inquirer*[12]; $3.5 million against the *El Paso Times*[13] and $2.2 million against *The Washington Post.*[14] In a seminal article analyzing the fury reflected in such verdicts, *Harper's* editor Lewis Lapham thought people had hopelessly high and unrealistic expectations of journalism, "Not only do they expect it to be entertaining, they expect it to be true."[15] Lapham saw a widespread propensity throughout journalism to report "formula" stories designed to reinforce people's conventional world views. He also suspected that the public had no idea how such structural constraints on news reporting tended to distort reality. "Let the public once suspect that the difference between fact

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[11] *See* Green v. Alton Tel. Printing Co., 107 Ill. App. 3d 755 (1982).

[12] *See* Massing, *The Libel Chill: How Cold Is It Out There?*, COLUMBIA JOURNALISM REVIEW, May/June 1985, at 39. Massing's article is perhaps the most illuminating documentation of the intimidating effect on journalists and on media management resulting from protracted and costly libel suits.

[13] *See id* at 32.

[14] Tavoulareas v. Washington Post Co., 567 F. Supp. 651 (D.D.C. 1983) (granting defendants' motion for j.n.o.v.), *aff'd*, 817 F.2d 762 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987).

[15] Lapham, *Gilding the News*, HARPER'S MAGAZINE, July 1981, at 39.

and fiction may be as random as a number drawn in a lottery, and their resentment will wreak an expensive vengeance," he wrote.

If journalists worried about the public's naivete about journalism, their lawyers tended to be dismayed at the typical juror's ostensible inability to comprehend the rules of modern libel law. Time and again in the early 1980s, jury verdicts against the press seemed to be based not on a reasoned application of the constitutional requirements of proof but rather on an evaluation of whether a publisher or broadcaster had been "fair" to the libel plaintiff. Appraised with the benefit of 20/20 hindsight, journalistic behavior frequently was found wanting. In the worst incidents, falsity was presumed,[16] public figure determinations were thrown to a hopelessly confused jury,[17] or the "actual malice" test was converted from a subjective inquiry as to whether the defendant in fact entertained doubts about truth prior to publication into a test of whether a reasonable man *should* have entertained such doubts.[18] It was not uncommon to hear the lament from the press that the *New York Times* doctrine was not understood by juries and that it did not, in practice, give the press the protection from passion and prejudice in jury boxes that it was designed to provide.

Just as the volume of libel suits brought by public persons seemed to reach a crescendo and just as skepticism mounted about the judiciary's ability to faithfully apply constitutional doctrine, the Supreme Court spoke. On the twentieth anniversary of the *New York Times* decision, a decisive 6–3 majority of the Court, joined in by Chief Justice Burger, reaffirmed in the broadest and most emphatic terms the wisdom of the *New York Times* doctrine. Writing for the Court, Justice Stevens ushered in a new generation's support for the doctrine in the watershed decision of *Bose Corp. v. Consumers Union.*[19]

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[16] *See* Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir.), *cert. dismissed,* 454 U.S. 1130 (1981).

[17] *See* Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981).

[18] *See* St. Amant v. Thompson, 390 U.S. 727 (1968); Tavoulareas v. Washington Post Co., 567 F. Supp. 651 (D.D.C. 1983) (granting defendants' motion for j.n.o.v.), *aff'd,* 817 F.2d 762 (D.C. Cir.) (en banc), *cert. denied,* 484 U.S. 870 (1987).

[19] 466 U.S. 485 (1984).

The Court held that appellate judges—including members of the High Court itself—must conduct an independent review of the record in libel cases to insure that the field of free expression had not been trampled upon.[20] The resonant language of the opinion sent an unmistakable message to all judges. It called, with unusual force and clarity, for all appellate courts to scrutinize coolly and dispassionately any libel verdict against the press to ensure that the press would continue to have a measure of breathing space or a margin for error to disseminate information about public affairs. Constitutional considerations, it was clear, would continue to pervade libel litigation for years to come.

§ 1.4 APRIL 1985

The Supreme Court's affirmation of the press' right to make mistakes, or be unfair when reporting about public persons, came only shortly before the nation saw its constitutional libel law tested in the cauldron of two of the most celebrated libel trials of the century.

In late 1984 the federal district courthouse for the Southern District of New York became the battlefield for two generals to launch offensives against major communications companies. On the main floor, General Ariel Sharon aimed his howitzers at *Time* magazine in front of Judge Abraham Sofaer and in a high-ceilinged chamber directly above the *Sharon* courtroom, General William Westmoreland climaxed his two year search and destroy mission against CBS before Judge Pierre Leval.[21] By the time Sharon had lost his libel case (but had returned to Israel with a rejuvenated political career) and West-

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[20] *Id.* at 498-511.

[21] *See* Westmoreland v. CBS, Inc., 596 F. Supp. 1170 (S.D.N.Y. 1984). Westmoreland's suit initially was filed in South Carolina, but venue was transferred to the Southern District of New York. Motions for summary judgment were denied in both the *Westmoreland* and *Sharon* cases, and Judge Leval's decision permitting the *Westmoreland* case to go to trial drew criticism, given the scant evidence against CBS of "actual malice." *See, e.g.*, Koeltl, *The Westmoreland Case Stirs Up Important Policy Questions For The Public And The Media*, COMM. L., Winter 1985.

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Presidential Commission Criticizes Some Forensic Methods

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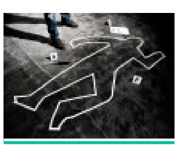
If you were to judge only by what's shown on detective-procedural television shows like CSI, you might think forensic investigations and crime lab results are virtually infallible. But from time to time, a government study comes along to point out how that's frequently far from the complete truth.

Take, for example, a groundbreaking study ordered by Congress and released in 2009 by the National Academy of Sciences' National Research Council. It pointed out numerous shortcomings, including scant scientific validation, for many forms of forensic evidence other than DNA, and urged more research, better standards and greater credentials for crime labs.

Then in April last year, the Federal Bureau of Investigation issued a report admitting its analysis of microscopic hair analysis frequently overstated the scientific reliability of such tests. In fact, DNA evidence in some instances revealed crime labs wrongly identified the source of hair fibers found at crime scenes.



On September 20th, 2016, after a year-long review of research studies, the President's Council of Advisors on Science and Technology (PCAST) issued a new report that was sharply critical of some forensic evidence methods commonly used in federal and state criminal courts.

The PCAST report, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, looked not only at the innate reliability of several types of forensic evidence — including analyzing bite marks, identifying firearms, microscopic hair analysis, footwear and tire-tread analysis — but also how the reliability

Presidential Commission Criticizes Some Forensic Methods

The new study found quite a few potentially serious problems, both in the weakness or absence of proof of the scientific validity of some types of forensic evidence — notably bite marks —especially "feature-comparison" attempts to differentiate between the particular source of a particular sample. Even for more reliably established types of evidence analysis, the report cautioned, experts may exaggerate their value by claiming greater-than-provable confidence in such findings.

The PCAST report also recommended specific actions that federal agencies — such as Commerce's National Institute of Standards and Technology, the White's House's Office of Science and Technology Policy, and the FBI Laboratory — could take to bring greater scientific certainty to forensic testing, as well as steps the Justice Department and federal courts could take to improve courtroom use of forensic test results.

Perhaps predictably, the PCAST report drew mixed responses. Some noted jurists associated with the project, such as federal appellate judges Alex Kozinski and Harry Edwards, wrote op-eds praising the report, but the reaction was quite different from prosecutors' and crime labs' groups. The National District Attorneys Association, for example, shot off a press release calling the PCAST report "scientifically irresponsible" and attacking the panel's members as unqualified to pass judgment on the issues they addressed.

The FBI also dissented, saying it takes issue with "many of the scientific assertions and conclusions" in the PCAST report, and the Justice Department has advised federal and state prosecutors that it planned to send them materials to use to counter claims in the report in case they are raised by litigants.

Christopher Zoukis is the author of College for Convicts: The Case for Higher Education in American Prisons (McFarland & Co., 2014) and Prison Education Guide (Prison Legal News Publishing, 2016). He can be found online at ChristopherZoukis.com, PrisonEducation.com and PrisonLawBlog.com

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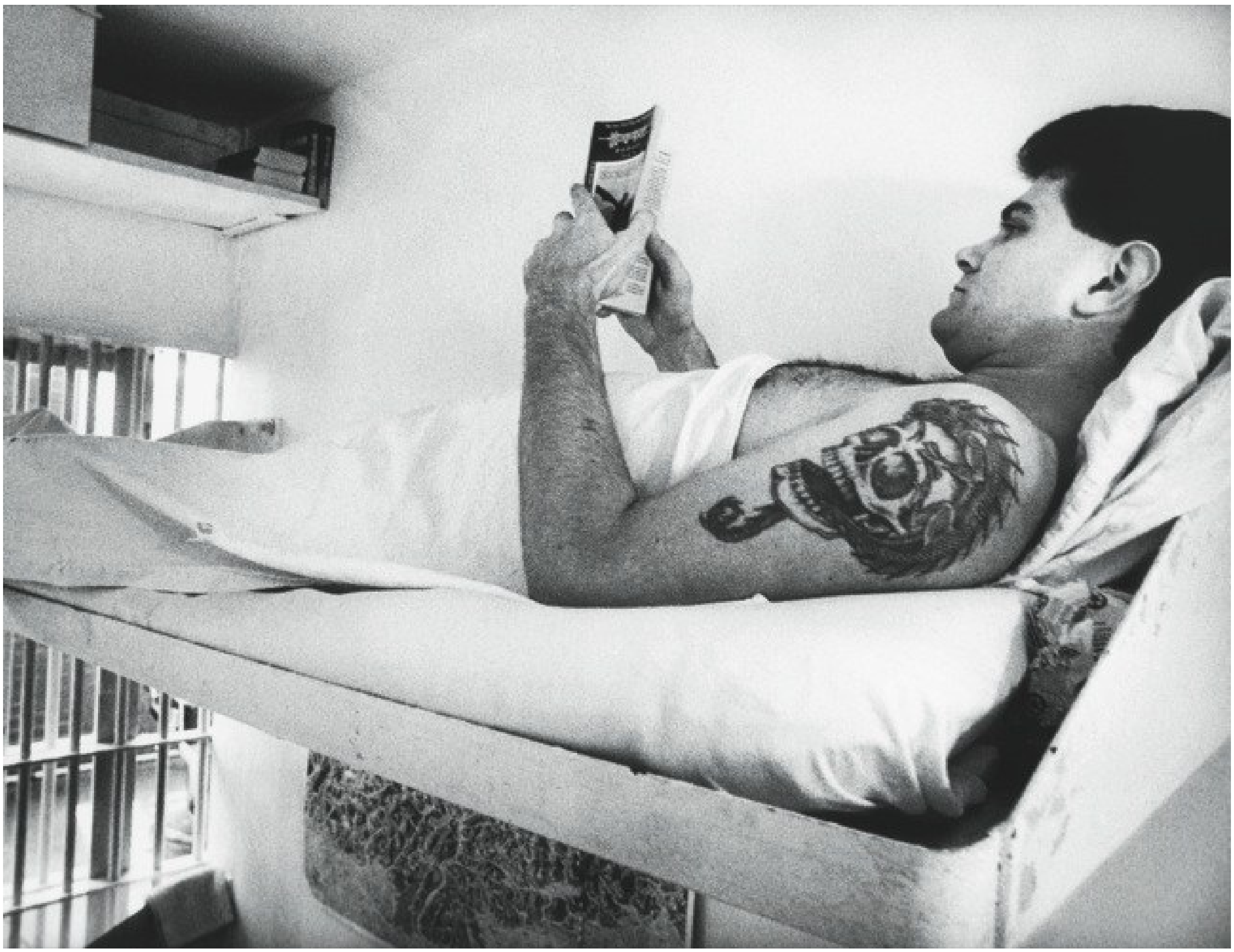
THE NEW YORKER

TRIAL BY FIRE

Did Texas execute an innocent man?

By David Grann August 31, 2009



Cameron Todd Willingham in his cell on death row, in 1994. He insisted upon his innocence in the deaths of his children and refused an offer to plead guilty in return for a life sentence.

Photograph By Ken Light

The fire moved quickly through the house, a one-story wood-frame structure in a working-class neighborhood of Corsicana, in northeast Texas. Flames spread along the walls, bursting through doorways, blistering paint and tiles and furniture.

Smoke pressed against the ceiling, then banked downward, seeping into each room and through crevices in the windows, staining the morning sky.

Buffie Barbee, who was eleven years old and lived two houses down, was playing in her back yard when she smelled the smoke. She ran inside and told her mother, Diane, and they hurried up the street; that's when they saw the smoldering house and Cameron Todd Willingham standing on the front porch, wearing only a pair of jeans, his chest blackened with soot, his hair and eyelids singed. He was screaming, "My babies are burning up!" His children—Karmon and Kameron, who were one-year-old twin girls, and two-year-old Amber—were trapped inside.

Willingham told the Barbees to call the Fire Department, and while Diane raced down the street to get help he found a stick and broke the children's bedroom window. Fire lashed through the hole. He broke another window; flames burst through it, too, and he retreated into the yard, kneeling in front of the house. A neighbor later told police that Willingham intermittently cried, "My babies!" then fell silent, as if he had "blocked the fire out of his mind."

Diane Barbee, returning to the scene, could feel intense heat radiating off the house. Moments later, the five windows of the children's room exploded and flames "blew out," as Barbee put it. Within minutes, the first firemen had arrived, and Willingham approached them, shouting that his children were in their bedroom, where the flames were thickest. A fireman sent word over his radio for rescue teams to "step on it."

More men showed up, uncoiling hoses and aiming water at the blaze. One fireman, who had an air tank strapped to his back and a mask covering his face, slipped through a window but was hit by water from a hose and had to retreat. He then charged through the front door, into a swirl of smoke and fire. Heading down the main corridor, he reached the kitchen, where he saw a refrigerator blocking the back door.

Todd Willingham, looking on, appeared to grow more hysterical, and a police chaplain named George Monaghan led him to the back of a fire truck and tried to calm him down. Willingham explained that his wife, Stacy, had gone out earlier that morning, and that he had been jolted from sleep by Amber screaming, "Daddy! Daddy!"

"My little girl was trying to wake me up and tell me about the fire," he said, adding, "I couldn't get my babies out."

While he was talking, a fireman emerged from the house, cradling Amber. As she was given C.P.R., Willingham, who was twenty-three years old and powerfully built, ran to see her, then suddenly headed toward the babies' room. Monaghan and another man restrained him. "We had to wrestle with him and then handcuff him, for his and our protection," Monaghan later told police. "I received a black eye." One of the first firemen at the scene told investigators that, at an earlier point, he had also held Willingham back. "Based on what I saw on how the fire was burning, it would have been crazy for anyone to try and go into the house," he said.

Willingham was taken to a hospital, where he was told that Amber—who had actually been found in the master bedroom—had died of smoke inhalation. Kameron and Karmon had been lying on the floor of the children's bedroom, their bodies severely burned. According to the medical examiner, they, too, died from smoke inhalation.

News of the tragedy, which took place on December 23, 1991, spread through Corsicana. A small city fifty-five miles northeast of Waco, it had once been the center of Texas's first oil boom, but many of the wells had since dried up, and more than a quarter of the city's twenty thousand inhabitants had fallen into poverty. Several stores along the main street were shuttered, giving the place the feel of an abandoned outpost.

Willingham and his wife, who was twenty-two years old, had virtually no money. Stacy worked in her brother's bar, called Some Other Place, and Willingham, an unemployed auto mechanic, had been caring for the kids. The community took up a collection to help the Willinghams pay for funeral arrangements.

Fire investigators, meanwhile, tried to determine the cause of the blaze. (Willingham gave authorities permission to search the house: "I know we might not ever know all the answers, but I'd just like to know why my babies were taken from me.") Douglas Fogg, who was then the assistant fire chief in Corsicana, conducted the initial inspection. He was tall, with a crew cut, and his voice was raspy from years of inhaling smoke from fires and cigarettes. He had grown up in Corsicana and, after graduating from high school, in 1963, he had joined the Navy, serving as a medic in Vietnam, where he was wounded on four occasions. He was awarded a Purple Heart each time.

After he returned from Vietnam, he became a firefighter, and by the time of the Willingham blaze he had been battling fire—or what he calls "the beast"—for more than twenty years, and had become a certified arson investigator. "You learn that fire talks to you," he told me.

He was soon joined on the case by one of the state's leading arson sleuths, a deputy fire marshal named Manuel Vasquez, who has since died. Short, with a paunch, Vasquez had investigated more than twelve hundred fires. Arson investigators have always been considered a special breed of detective. In the 1991 movie "Backdraft," a heroic arson investigator says of fire, "It breathes, it eats, and it hates. The only way to beat it is to think like it. To know that this flame will spread this way across the door and up across the ceiling." Vasquez, who had previously worked in Army intelligence, had several maxims of his own. One was "Fire does not destroy evidence—it creates it." Another was "The fire tells the story. I am just the interpreter." He cultivated a Sherlock Holmes-like aura of invincibility. Once, he was asked under oath whether he had ever been mistaken in a case. "If I have, sir, I don't know," he responded. "It's never been pointed out."

Vasquez and Fogg visited the Willinghams' house four days after the blaze. Following protocol, they moved from the least burned areas toward the most damaged ones. "It is a systematic method," Vasquez later testified, adding, "I'm just collecting information. . . . I have not made any determination. I don't have any preconceived idea."

The men slowly toured the perimeter of the house, taking notes and photographs, like archeologists mapping out a ruin. Upon opening the back door, Vasquez observed that there was just enough space to squeeze past the refrigerator blocking the exit. The air smelled of burned rubber and melted wires; a damp ash covered the ground, sticking to their boots. In the kitchen, Vasquez and Fogg discerned only smoke and heat damage—a sign that the fire had not originated there—and so they pushed deeper into the nine-hundred-and-seventy-five-square-foot building. A central corridor led past a utility room and the master bedroom, then past a small living room, on the left, and the children's bedroom, on the right, ending at the front door, which opened onto the porch. Vasquez tried to take in everything, a process that he compared to entering one's mother-in-law's house for the first time: "I have the same curiosity."

In the utility room, he noticed on the wall pictures of skulls and what he later described as an image of "the Grim Reaper." Then he turned into the master bedroom, where Amber's body had been found. Most of the damage there was also from smoke and heat, suggesting that the fire had started farther down the hallway, and he headed that way, stepping over debris and ducking under insulation and wiring that hung down from the exposed ceiling.

As he and Fogg removed some of the clutter, they noticed deep charring along the base of the walls. Because gases become buoyant when heated, flames ordinarily burn upward. But Vasquez and Fogg observed that the fire had burned extremely low down, and that there were peculiar char patterns on the floor, shaped like puddles.

Vasquez's mood darkened. He followed the "burn trailer"—the path etched by the fire—which led from the hallway into the children's bedroom. Sunlight filtering through the broken windows illuminated more of the irregularly shaped char patterns. A flammable or combustible liquid doused on a floor will cause a fire to concentrate in these kinds of pockets, which is why investigators refer to them as "pour patterns" or "puddle configurations."

The fire had burned through layers of carpeting and tile and plywood flooring. Moreover, the metal springs under the children's beds had turned white—a sign that intense heat had radiated beneath them. Seeing that the floor had some of the deepest burns, Vasquez deduced that it had been hotter than the ceiling, which, given that heat rises, was, in his words, "not normal."

Fogg examined a piece of glass from one of the broken windows. It contained a spiderweb-like pattern—what fire investigators call "crazed glass." Forensic textbooks had long described the effect as a key indicator that a fire had burned "fast and hot," meaning that it had been fuelled by a liquid accelerant, causing the glass to fracture.

The men looked again at what appeared to be a distinct burn trailer through the house: it went from the children's bedroom into the corridor, then turned sharply to the right and proceeded out the front door. To the investigators' surprise, even the wood under the door's aluminum threshold was charred. On the concrete floor of the porch, just outside the front door, Vasquez and Fogg noticed another unusual thing: brown stains, which, they reported, were consistent with the presence of an accelerant.

The men scanned the walls for soot marks that resembled a "V." When an object catches on fire, it creates such a pattern, as heat and smoke radiate outward; the bottom of the "V" can therefore point to where a fire began. In the Willingham house, there was a distinct "V" in the main corridor. Examining it and other burn patterns, Vasquez identified three places where fire had originated: in the hallway, in the children's bedroom, and at the front door. Vasquez later testified that multiple origins pointed to one conclusion: the fire was "intentionally set by human hands."

By now, both investigators had a clear vision of what had happened. Someone had poured liquid accelerant throughout the children's room, even under their beds, then poured some more along the adjoining hallway and out the front door, creating a "fire barrier" that prevented anyone from escaping; similarly, a prosecutor later suggested, the refrigerator in the kitchen had been moved to block the back-door exit. The house, in short, had been deliberately transformed into a death trap.

The investigators collected samples of burned materials from the house and sent them to a laboratory that could detect the presence of a liquid accelerant. The lab's chemist reported that one of the samples contained evidence of "mineral spirits," a substance that is often found in charcoal-lighter fluid. The sample had been taken by the threshold of the front door.

The fire was now considered a triple homicide, and Todd Willingham—the only person, besides the victims, known to have been in the house at the time of the blaze—became the prime suspect.

Police and fire investigators canvassed the neighborhood, interviewing witnesses. Several, like Father Monaghan, initially portrayed Willingham as devastated by the fire. Yet, over time, an increasing number of witnesses offered damning statements. Diane Barbee said that she had not seen Willingham try to enter the house until after the authorities arrived, as if he were putting on a show. And when the children's room exploded with flames, she added, he seemed more preoccupied with his car, which he moved down the driveway. Another neighbor reported that when Willingham cried out for his babies he "did not appear to be excited or concerned." Even Father Monaghan wrote in a statement that, upon further reflection, "things were not as they seemed. I had the feeling that [Willingham] was in complete control."

The police began to piece together a disturbing profile of Willingham. Born in Ardmore, Oklahoma, in 1968, he had been abandoned by his mother when he was a baby. His father, Gene, who had divorced his mother, eventually raised him with his stepmother, Eugenia. Gene, a former U.S. marine, worked in a salvage yard, and the family lived in a cramped house; at night, they could hear freight trains rattling past on a nearby track. Willingham, who had what the family called the "classic Willingham look"—a handsome face, thick black hair, and dark eyes—struggled in school, and as a teen-ager began to sniff paint. When he was seventeen, Oklahoma's Department of Human Services evaluated him, and reported, "He likes 'girls,' music, fast cars, sharp trucks, swimming, and hunting, in that order." Willingham dropped out of high school, and over time was arrested for, among other things, driving under the influence, stealing a bicycle, and shoplifting.

In 1988, he met Stacy, a senior in high school, who also came from a troubled background: when she was four years old, her stepfather had strangled her mother to death during a fight. Stacy and Willingham had a turbulent relationship. Willingham, who was unfaithful, drank too much Jack Daniel's, and sometimes hit Stacy—even when she was pregnant. A neighbor said that he once heard Willingham yell at her, "Get up, bitch, and I'll hit you again."

On December 31st, the authorities brought Willingham in for questioning. Fogg and Vasquez were present for the interrogation, along with Jimmie Hensley, a police officer who was working his first arson case. Willingham said that Stacy had left the house around 9 A.M. to pick up a Christmas present for the kids, at the Salvation Army. "After she got out of the driveway, I heard the twins cry, so I got up and gave them a bottle," he said. The children's room had a safety gate across the doorway, which Amber could climb over but not the twins, and he and Stacy often let the twins nap on the floor after they drank their bottles. Amber was still in bed, Willingham said, so he went back into his room to sleep. "The next thing I remember is hearing 'Daddy, Daddy,'" he recalled. "The house was already full of smoke." He said that he got up, felt around the floor for a pair of pants, and put them on. He could no longer hear his daughter's voice ("I heard that last 'Daddy, Daddy' and never heard her again"), and he hollered, "Oh God—Amber, get out of the house! Get out of the house!'"

He never sensed that Amber was in his room, he said. Perhaps she had already passed out by the time he stood up, or perhaps she came in after he left, through a second doorway, from the living room. He said that he went down the corridor and tried to reach the children's bedroom. In the hallway, he said, "you couldn't see nothing but black." The air smelled the way it had when their microwave had blown up, three weeks earlier—like "wire and stuff like that." He could hear sockets and light switches popping, and he crouched down, almost crawling. When he made it to the children's bedroom, he said, he stood and his hair caught on fire. "Oh God, I never felt anything that hot before," he said of the heat radiating out of the room.

After he patted out the fire on his hair, he said, he got down on the ground and groped in the dark. "I thought I found one of them once," he said, "but it was a doll." He couldn't bear the heat any longer. "I felt myself passing out," he said. Finally, he stumbled down the corridor and out the front door, trying to catch his breath. He saw Diane Barbee and yelled for her to call the Fire Department. After she left, he insisted, he tried without success to get back inside.

The investigators asked him if he had any idea how the fire had started. He said that he wasn't sure, though it must have originated in the children's room, since that was where he first saw flames; they were glowing like "bright lights." He and Stacy used three space heaters to keep the house warm, and one of them was in the children's room. "I taught Amber not to play with it," he said, adding that she got "whuppings every once in a while for messing with it." He said that he didn't know if the heater, which had an internal flame, was turned on. (Vasquez later testified that when he had checked the heater, four days after the fire, it was in the "Off" position.) Willingham speculated that the fire might have been started by something electrical: he had heard all that popping and crackling.

When pressed whether someone might have a motive to hurt his family, he said that he couldn't think of anyone that "cold-blooded." He said of his children, "I just don't understand why anybody would take them, you know? We had three of the most pretty babies anybody could have ever asked for." He went on, "Me and Stacy's been together for four years, but off and on we get into a fight and split up for a while and I think those babies is what brought us so close together . . . neither one of us . . . could live without them kids." Thinking of Amber, he said, "To tell you the honest-to-God's truth, I wish she hadn't woke me up."

During the interrogation, Vasquez let Fogg take the lead. Finally, Vasquez turned to Willingham and asked a seemingly random question: had he put on shoes before he fled the house?

"No, sir," Willingham replied.

A map of the house was on a table between the men, and Vasquez pointed to it. "You walked out this way?" he said.

Willingham said yes.

Vasquez was now convinced that Willingham had killed his children. If the floor had been soaked with a liquid accelerant and the fire had burned low, as the evidence suggested, Willingham could not have run out of the house the way he had described without badly burning his feet. A medical report indicated that his feet had been unscathed.

Willingham insisted that, when he left the house, the fire was still around the top of the walls and not on the floor. "I didn't have to jump through any flames," he said. Vasquez believed that this was impossible, and that Willingham had lit the fire as he was retreating—first, torching the children's room, then the hallway, and then, from the porch, the front door. Vasquez later said of Willingham, "He told me a story of pure fabrication. . . . He just talked and he talked and all he did was lie."

Still, there was no clear motive. The children had life-insurance policies, but they amounted to only fifteen thousand dollars, and Stacy's grandfather, who had paid for them, was listed as the primary beneficiary. Stacy told investigators that even though Willingham hit her he had never abused the children—"Our kids were spoiled rotten," she said—and she did not believe that Willingham could have killed them.

Ultimately, the authorities concluded that Willingham was a man without a conscience whose serial crimes had climaxed, almost inexorably, in murder. John Jackson, who was then the assistant district attorney in Corsicana, was assigned to prosecute Willingham's case. He later told the Dallas *Morning News* that he considered

Willingham to be "an utterly sociopathic individual" who deemed his children "an impediment to his lifestyle." Or, as the local district attorney, Pat Batchelor, put it, "The children were interfering with his beer drinking and dart throwing."

On the night of January 8, 1992, two weeks after the fire, Willingham was riding in a car with Stacy when SWAT teams surrounded them, forcing them to the side of the road. "They pulled guns out like we had just robbed ten banks," Stacy later recalled. "All we heard was 'click, click.' . . . Then they arrested him."

Willingham was charged with murder. Because there were multiple victims, he was eligible for the death penalty, under Texas law. Unlike many other prosecutors in the state, Jackson, who had ambitions of becoming a judge, was personally opposed to capital punishment. "I don't think it's effective in deterring criminals," he told me. "I just don't think it works." He also considered it wasteful: because of the expense of litigation and the appeals process, it costs, on average, $2.3 million to execute a prisoner in Texas—about three times the cost of incarcerating someone for forty years. Plus, Jackson said, "What's the recourse if you make a mistake?" Yet his boss, Batchelor, believed that, as he once put it, "certain people who commit bad enough crimes give up the right to live," and Jackson came to agree that the heinous nature of the crime in the Willingham case—"one of the worst in terms of body count" that he had ever tried—mandated death.

Willingham couldn't afford to hire lawyers, and was assigned two by the state: David Martin, a former state trooper, and Robert Dunn, a local defense attorney who represented everyone from alleged murderers to spouses in divorce cases—a "Jack-of-all-trades," as he calls himself. ("In a small town, you can't say 'I'm a so-and-so lawyer,' because you'll starve to death," he told me.)

The Willingham family in the days before Christmas, 1991.

Not long after Willingham's arrest, authorities received a message from a prison inmate named Johnny Webb, who was in the same jail as Willingham. Webb alleged that Willingham had confessed to him that he took "some kind of lighter fluid, squirting [it] around the walls and the floor, and set a fire." The case against Willingham was considered airtight.

Even so, several of Stacy's relatives—who, unlike her, believed that Willingham was guilty—told Jackson that they preferred to avoid the anguish of a trial. And so, shortly before jury selection, Jackson approached Willingham's attorneys with an extraordinary offer: if their client pleaded guilty, the state would give him a life sentence. "I was really happy when I thought we might have a deal to avoid the death penalty," Jackson recalls.

Willingham's lawyers were equally pleased. They had little doubt that he had committed the murders and that, if the case went before a jury, he would be found guilty, and, subsequently, executed. "Everyone thinks defense lawyers must believe their clients are innocent, but that's seldom true," Martin told me. "Most of the time, they're guilty as sin." He added of Willingham, "All the evidence showed that he was one hundred per cent guilty. He poured accelerant all over the house and put lighter fluid under the kids' beds." It was, he said, "a classic arson case": there were "puddle patterns all over the place—no disputing those."

Martin and Dunn advised Willingham that he should accept the offer, but he refused. The lawyers asked his father and stepmother to speak to him. According to Eugenia, Martin showed them photographs of the burned children and said, "Look what your son did. You got to talk him into pleading, or he's going to be executed."

His parents went to see their son in jail. Though his father did not believe that he should plead guilty if he were innocent, his stepmother beseeched him to take the deal. "I just wanted to keep my boy alive," she told me.

Willingham was implacable. "I ain't gonna plead to something I didn't do, especially killing my own kids," he said. It was his final decision. Martin says, "I thought it was nuts at the time—and I think it's nuts now."

Willingham's refusal to accept the deal confirmed the view of the prosecution, and even that of his defense lawyers, that he was an unrepentant killer.

In August, 1992, the trial commenced in the old stone courthouse in downtown Corsicana. Jackson and a team of prosecutors summoned a procession of witnesses, including Johnny Webb and the Barbees. The crux of the state's case, though, remained the scientific evidence gathered by Vasquez and Fogg. On the stand, Vasquez detailed what he called more than "twenty indicators" of arson.

"Do you have an opinion as to who started the fire?" one of the prosecutors asked.

"Yes, sir," Vasquez said. "Mr. Willingham."

The prosecutor asked Vasquez what he thought Willingham's intent was in lighting the fire. "To kill the little girls," he said.

The defense had tried to find a fire expert to counter Vasquez and Fogg's testimony, but the one they contacted concurred with the prosecution. Ultimately, the defense presented only one witness to the jury: the Willinghams' babysitter, who said she could not believe that Willingham could have killed his children. (Dunn told me that Willingham had wanted to testify, but Martin and Dunn thought that he would make a bad witness.) The trial ended after two days.

During his closing arguments, Jackson said that the puddle configurations and pour patterns were Willingham's inadvertent "confession," burned into the floor. Showing a Bible that had been salvaged from the fire, Jackson paraphrased the words of Jesus from the Gospel of Matthew: "Whomsoever shall harm one of my children, it's better for a millstone to be hung around his neck and for him to be cast in the sea."

The jury was out for barely an hour before returning with a unanimous guilty verdict. As Vasquez put it, "The fire does not lie."

II

When Elizabeth Gilbert approached the prison guard, on a spring day in 1999, and said Cameron Todd Willingham's name, she was uncertain about what she was doing. A forty-seven-year-old French teacher and playwright from Houston, Gilbert was divorced with two children. She had never visited a prison before. Several weeks earlier, a friend, who worked at an organization that opposed the death penalty, had encouraged her to volunteer as a pen pal for an inmate on death row, and Gilbert had offered her name and address. Not long after, a short letter, written with unsteady penmanship, arrived from Willingham. "If you wish to write back, I would be honored to correspond with you," he said. He also asked if she might visit him. Perhaps out of a writer's curiosity, or perhaps because she didn't feel quite herself (she had just been upset by news that her ex-husband was dying of cancer), she agreed. Now she was standing in front of the decrepit penitentiary in Huntsville, Texas—a place that inmates referred to as “the death pit.”

She filed past a razor-wire fence, a series of floodlights, and a checkpoint, where she was patted down, until she entered a small chamber. Only a few feet in front of her was a man convicted of multiple infanticide. He was wearing a white jumpsuit with “DR”—for death row—printed on the back, in large black letters. He had a tattoo of a serpent and a skull on his left biceps. He stood nearly six feet tall and was muscular, though his legs had atrophied after years of confinement.

A Plexiglas window separated Willingham from her; still, Gilbert, who had short brown hair and a bookish manner, stared at him uneasily. Willingham had once fought another prisoner who called him a “baby killer,” and since he had been incarcerated, seven years earlier, he had committed a series of disciplinary infractions that had periodically landed him in the segregation unit, which was known as “the dungeon.”

Willingham greeted her politely. He seemed grateful that she had come. After his conviction, Stacy had campaigned for his release. She wrote to Ann Richards, then the governor of Texas, saying, “I know him in ways that no one else does when it comes to our children. Therefore, I believe that there is no way he could have possibly committed this crime.” But within a year Stacy had filed for divorce, and Willingham had few visitors except for his parents, who drove from Oklahoma to see him once a month. “I really have no one outside my parents to remind me that I am a human being, not the animal the state professes I am,” he told Gilbert at one point.

He didn’t want to talk about death row. “Hell, I live here,” he later wrote her. “When I have a visit, I want to escape from here.” He asked her questions about her teaching and art. He expressed fear that, as a playwright, she might find him a “one-dimensional character,” and apologized for lacking social graces; he now had trouble separating the mores in prison from those of the outside world.

The aftermath of the fire on December 23, 1991. Photograph from Texas State Fire Marshal’s Office

Photograph from Texas State Fire Marshal’s Office

When Gilbert asked him if he wanted something to eat or drink from the vending machines, he declined. “I hope I did not offend you by not accepting any snacks,” he later wrote her. "I didn't want you to feel I was there just for something like that."

She had been warned that prisoners often tried to con visitors. He appeared to realize this, subsequently telling her, "I am just a simple man. Nothing else. And to most other people a convicted killer looking for someone to manipulate."

Their visit lasted for two hours, and afterward they continued to correspond. She was struck by his letters, which seemed introspective, and were not at all what she had expected. "I am a very honest person with my feelings," he wrote her. "I will not bullshit you on how I feel or what I think." He said that he used to be stoic, like his father. But, he added, "losing my three daughters . . . my home, wife and my life, you tend to wake up a little. I have learned to open myself."

She agreed to visit him again, and when she returned, several weeks later, he was visibly moved. "Here I am this person who nobody on the outside is ever going to know as a human, who has lost so much, but still trying to hold on," he wrote her afterward. "But you came back! I don't think you will ever know of what importance that visit was in my existence."

They kept exchanging letters, and she began asking him about the fire. He insisted that he was innocent and that, if someone had poured accelerant through the house and lit it, then the killer remained free. Gilbert wasn't naïve—she assumed that he was guilty. She did not mind giving him solace, but she was not there to absolve him.

Still, she had become curious about the case, and one day that fall she drove down to the courthouse in Corsicana to review the trial records. Many people in the community remembered the tragedy, and a clerk expressed bewilderment that anyone would be interested in a man who had burned his children alive.

Gilbert took the files and sat down at a small table. As she examined the eyewitness accounts, she noticed several contradictions. Diane Barbee had reported that, before the authorities arrived at the fire, Willingham never tried to get back into the house—yet she had been absent for some time while calling the Fire Department. Meanwhile, her daughter Buffie had reported witnessing Willingham on the porch breaking a window, in an apparent effort to reach his children. And the firemen and police on the scene had described Willingham frantically trying to get into the house.

The witnesses' testimony also grew more damning after authorities had concluded, in the beginning of January, 1992, that Willingham was likely guilty of murder. In Diane Barbee's initial statement to authorities, she had portrayed Willingham as "hysterical," and described the front of the house exploding. But on January 4th, after arson investigators began suspecting Willingham of murder, Barbee suggested that he could have gone back inside to rescue his children, for at the outset she had seen only "smoke coming from out of the front of the house"—smoke that was not "real thick."

An even starker shift occurred with Father Monaghan's testimony. In his first statement, he had depicted Willingham as a devastated father who had to be repeatedly restrained from risking his life. Yet, as investigators were preparing to arrest Willingham, he concluded that Willingham had been *too* emotional ("He seemed to have the type of distress that a woman who had given birth would have upon seeing her children die"); and he expressed a "gut feeling" that Willingham had "something to do with the setting of the fire."

Dozens of studies have shown that witnesses' memories of events often change when they are supplied with new contextual information. Itiel Dror, a cognitive psychologist who has done extensive research on eyewitness and expert testimony in criminal investigations, told me, "The mind is not a passive machine. Once you believe in something—once you expect something—it changes the way you perceive information and the way your memory recalls it."

After Gilbert's visit to the courthouse, she kept wondering about Willingham's motive, and she pressed him on the matter. In response, he wrote, of the death of his children, "I do not talk about it much anymore and it is still a very powerfully emotional pain inside my being." He admitted that he had been a "sorry-ass husband" who had hit Stacy—something he deeply regretted. But he said that he had loved his children and would never have hurt them. Fatherhood, he said, had changed him; he stopped being a hoodlum and "settled down" and "became a man." Nearly three months before the fire, he and Stacy, who had never married, wed at a small ceremony in his home town of Ardmore. He said that the prosecution had seized upon incidents from his past and from the day of the fire to create a portrait of a "demon," as Jackson, the prosecutor, referred to him. For instance, Willingham said, he had moved the car during the fire simply because he didn't want it to explode by the house, further threatening the children.

Gilbert was unsure what to make of his story, and she began to approach people who were involved in the case, asking them questions. "My friends thought I was crazy," Gilbert recalls. "I'd never done anything like this in my life."

One morning, when Willingham's parents came to visit him, Gilbert arranged to see them first, at a coffee shop near the prison. Gene, who was in his seventies, had the Willingham look, though his black hair had gray streaks and his dark eyes were magnified by glasses. Eugenia, who was in her fifties, with silvery hair, was as sweet and talkative as her husband was stern and reserved. The drive from Oklahoma to Texas took six hours, and they had woken at three in the morning; because they could not afford a motel, they would have to return home later that day. "I feel like a real burden to them," Willingham had written Gilbert.

As Gene and Eugenia sipped coffee, they told Gilbert how grateful they were that someone had finally taken an interest in Todd's case. Gene said that his son, though he had flaws, was no killer.

The evening before the fire, Eugenia said, she had spoken on the phone with Todd. She and Gene were planning on visiting two days later, on Christmas Eve, and Todd told her that he and Stacy and the kids had just picked up family photographs. "He said, 'We got your pictures for Christmas,'" she recalled. "He put Amber on the phone, and she was tattling on one of the twins. Todd didn't seem upset. If something was bothering him, I would have known."

The aftermath of the fire on December 23, 1991. Photograph from Texas State Fire Marshal's Office

Photograph from Texas State Fire Marshal's Office

Gene and Eugenia got up to go: they didn't want to miss any of the four hours that were allotted for the visit with their son. Before they left, Gene said, "You'll let us know if you find anything, won't you?"

Over the next few weeks, Gilbert continued to track down sources. Many of them, including the Barbees, remained convinced that Willingham was guilty, but several of his friends and relatives had doubts. So did some people in law enforcement. Willingham's former probation officer in Oklahoma, Polly Goodin, recently told me that Willingham had never demonstrated bizarre or sociopathic behavior. "He was probably one of my favorite kids," she said. Even a former judge named Bebe Bridges—who had often stood, as she put it, on the "opposite side" of Willingham in the legal system, and who had sent him to jail for stealing—told me that she could not imagine him killing his children. "He was polite, and he seemed to care," she said. "His convictions had been for dumb-kid stuff. Even the things stolen weren't significant." Several months before the fire, Willingham tracked Goodin down at her office, and proudly showed her photographs of Stacy and the kids. "He wanted Bebe and me to know he'd been doing good," Goodin recalled.

Eventually, Gilbert returned to Corsicana to interview Stacy, who had agreed to meet at the bed-and-breakfast where Gilbert was staying. Stacy was slightly plump, with pale, round cheeks and feathered dark-blond hair; her bangs were held in place by gel, and her face was heavily made up. According to a tape recording of the conversation, Stacy said that nothing unusual had happened in the days before the fire. She and Willingham had not fought, and were preparing for the holiday. Though Vasquez, the arson expert, had recalled finding the space heater off, Stacy was sure that, at least on the day of the incident—a cool winter morning—it had been on. "I remember turning it down," she recalled. "I always thought, Gosh, could Amber have put something in there?" Stacy added that, more than once, she had caught Amber "putting things too close to it."

Willingham had often not treated her well, she recalled, and after his incarceration she had left him for a man who did. But she didn't think that her former husband should be on death row. "I don't think he did it," she said, crying.

Though only the babysitter had appeared as a witness for the defense during the main trial, several family members, including Stacy, testified during the penalty phase, asking the jury to spare Willingham's life. When Stacy was on the stand, Jackson grilled her about the "significance" of Willingham's "very large tattoo of a skull, encircled by some kind of a serpent."

"It's just a tattoo," Stacy responded.

"He just likes skulls and snakes. Is that what you're saying?"

"No. He just had—he got a tattoo on him."

The prosecution cited such evidence in asserting that Willingham fit the profile of a sociopath, and brought forth two medical experts to confirm the theory. Neither had met Willingham. One of them was Tim Gregory, a psychologist with a master's degree in marriage and family issues, who had previously gone goose hunting with Jackson, and had not published any research in the field of sociopathic behavior. His practice was devoted to family counselling.

At one point, Jackson showed Gregory Exhibit No. 60—a photograph of an Iron Maiden poster that had hung in Willingham's house—and asked the psychologist to interpret it. "This one is a picture of a skull, with a fist being punched through the skull," Gregory said; the image displayed "violence" and "death." Gregory looked at photographs of other music posters owned by Willingham. "There's a hooded skull, with wings and a hatchet," Gregory continued. "And all of these are in fire, depicting—it reminds me of something like Hell. And there's a picture—a Led Zeppelin picture of a falling angel. . . . I see there's an association many times with cultive-type of activities. A focus on death, dying. Many times individuals that have a lot of this type of art have interest in satanic-type activities."

The other medical expert was James P. Grigson, a forensic psychiatrist. He testified so often for the prosecution in capital-punishment cases that he had become known as Dr.

Death. (A Texas appellate judge once wrote that when Grigson appeared on the stand the defendant might as well "commence writing out his last will and testament.") Grigson suggested that Willingham was an "extremely severe sociopath," and that "no pill" or treatment could help him. Grigson had previously used nearly the same words in helping to secure a death sentence against Randall Dale Adams, who had been convicted of murdering a police officer, in 1977. After Adams, who had no prior criminal record, spent a dozen years on death row—and once came within seventy-two hours of being executed—new evidence emerged that absolved him, and he was released. In 1995, three years after Willingham's trial, Grigson was expelled from the American Psychiatric Association for violating ethics. The association stated that Grigson had repeatedly arrived at a "psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100-per-cent certainty that the individuals would engage in future violent acts."

After speaking to Stacy, Gilbert had one more person she wanted to interview: the jailhouse informant Johnny Webb, who was incarcerated in Iowa Park, Texas. She wrote to Webb, who said that she could see him, and they met in the prison visiting room. A man in his late twenties, he had pallid skin and a closely shaved head; his eyes were jumpy, and his entire body seemed to tremble. A reporter who once met him described him to me as "nervous as a cat around rocking chairs." Webb had begun taking drugs when he was nine years old, and had been convicted of, among other things, car theft, selling marijuana, forgery, and robbery.

As Gilbert chatted with him, she thought that he seemed paranoid. During Willingham's trial, Webb disclosed that he had been given a diagnosis of "post-traumatic stress disorder" after he was sexually assaulted in prison, in 1988, and that he often suffered from "mental impairment." Under cross-examination, Webb testified that he had no recollection of a robbery that he had pleaded guilty to only months earlier.

Johnny Webb claimed that Willingham confessed to him in prison. Photograph by Alex Garcia / Chicago Tribune

Photograph by Alex Garcia / Chicago Tribune

Webb repeated for her what he had said in court: he had passed by Willingham's cell, and as they spoke through a food slot Willingham broke down and told him that he intentionally set the house on fire. Gilbert was dubious. It was hard to believe that Willingham, who had otherwise insisted on his innocence, had suddenly confessed to an inmate he barely knew. The conversation had purportedly taken place by a speaker system that allowed any of the guards to listen—an unlikely spot for an inmate to reveal a secret. What's more, Webb alleged that Willingham had told him that Stacy had hurt one of the kids, and that the fire was set to cover up the crime. The autopsies, however, had revealed no bruises or signs of trauma on the children's bodies.

Jailhouse informants, many of whom are seeking reduced time or special privileges, are notoriously unreliable. According to a 2004 study by the Center on Wrongful Convictions, at Northwestern University Law School, lying police and jailhouse informants are the leading cause of wrongful convictions in capital cases in the United States. At the time that Webb came forward against Willingham, he was facing charges of robbery and forgery. During Willingham's trial, another inmate planned to testify that he had overheard Webb saying to another prisoner that he was hoping to "get time cut," but the testimony was ruled inadmissible, because it was hearsay. Webb, who pleaded guilty to the robbery and forgery charges, received a sentence of fifteen years. Jackson, the prosecutor, told me that he generally considered Webb "an unreliable kind of guy," but added, "I saw no real motive for him to make a statement like this if it wasn't true. We didn't cut him any slack." In 1997, five years after Willingham's trial, Jackson urged the Texas Board of Pardons and Paroles to grant Webb parole. "I asked them to cut him loose early," Jackson told me. The reason, Jackson said, was that Webb had been targeted by the Aryan Brotherhood. The board granted Webb parole, but within months of his release he was caught with cocaine and returned to prison.

In March, 2000, several months after Gilbert's visit, Webb unexpectedly sent Jackson a Motion to Recant Testimony, declaring, "Mr. Willingham is innocent of all charges." But Willingham's lawyer was not informed of this development, and soon afterward Webb, without explanation, recanted his recantation. When I recently asked Webb, who was released from prison two years ago, about the turnabout and why Willingham would have confessed to a virtual stranger, he said that he knew only what "the dude told me." After I pressed him, he said, "It's very possible I misunderstood what he said." Since the trial, Webb has been given an additional diagnosis, bipolar disorder. "Being locked up in that little cell makes you kind of crazy," he said. "My memory is in bits and pieces. I was on a lot of medication at the time. Everyone knew that." He paused, then said, "The statute of limitations has run out on perjury, hasn't it?"

Aside from the scientific evidence of arson, the case against Willingham did not stand up to scrutiny. Jackson, the prosecutor, said of Webb's testimony, "You can take it or leave it." Even the refrigerator's placement by the back door of the house turned out to be innocuous; there were two refrigerators in the cramped kitchen, and one of them was by the back door. Jimmie Hensley, the police detective, and Douglas Fogg, the assistant fire chief, both of whom investigated the fire, told me recently that they had never believed that the fridge was part of the arson plot. "It didn't have nothing to do with the fire," Fogg said.

After months of investigating the case, Gilbert found that her faith in the prosecution was shaken. As she told me, "What if Todd really was innocent?"

III

In the summer of 1660, an Englishman named William Harrison vanished on a walk, near the village of Charingworth, in Gloucestershire. His bloodstained hat was soon discovered on the side of a local road. Police interrogated Harrison's servant, John Perry, and eventually Perry gave a statement that his mother and his brother had killed Harrison for money. Perry, his mother, and his brother were hanged.

Two years later, Harrison reappeared. He insisted, fancifully, that he had been abducted by a band of criminals and sold into slavery. Whatever happened, one thing was indisputable: he had not been murdered by the Perrys.

The fear that an innocent person might be executed has long haunted jurors and lawyers and judges. During America's Colonial period, dozens of crimes were punishable by death, including horse thievery, blasphemy, "man-stealing," and highway robbery. After independence, the number of crimes eligible for the death penalty was gradually reduced, but doubts persisted over whether legal procedures were sufficient to prevent an innocent person from being executed. In 1868, John Stuart Mill made one of the most eloquent defenses of capital punishment, arguing that executing a murderer did not display a wanton disregard for life but, rather, proof of its value. "We show, on the contrary, most emphatically our regard for it by the adoption of a rule that he who violates that right in another forfeits it for himself," he said. For Mill, there was one counterargument that carried weight—"that if by an error of justice an innocent person is put to death, the mistake can never be corrected."

The modern legal system, with its lengthy appeals process and clemency boards, was widely assumed to protect the kind of "error of justice" that Mill feared. In 2000, while George W. Bush was governor of Texas, he said, "I know there are some in the country who don't care for the death penalty, but . . . we've adequately answered innocence or guilt." His top policy adviser on issues of criminal justice emphasized that there is "super due process to make sure that no innocent defendants are executed."

In recent years, though, questions have mounted over whether the system is fail-safe. Since 1976, more than a hundred and thirty people on death row have been exonerated. DNA testing, which was developed in the eighties, saved seventeen of them, but the technique can be used only in rare instances. Barry Scheck, a co-founder of the Innocence Project, which has used DNA testing to exonerate prisoners, estimates that about eighty per cent of felonies do not involve biological evidence.

In 2000, after thirteen people on death row in Illinois were exonerated, George Ryan, who was then governor of the state, suspended the death penalty. Though he had been a longtime advocate of capital punishment, he declared that he could no longer support a system that has "come so close to the ultimate nightmare—the state's taking of innocent life." Former Supreme Court Justice Sandra Day O'Connor has said that the "execution of a legally and factually innocent person would be a constitutionally intolerable event."

Such a case has become a kind of grisly Holy Grail among opponents of capital punishment. In his 2002 book "The Death Penalty," Stuart Banner observes, "The prospect of killing an innocent person seemed to be the one thing that could cause people to rethink their support for capital punishment. Some who were not troubled by statistical arguments against the death penalty—claims about deterrence or racial disparities—were deeply troubled that such an extreme injustice might occur in an individual case." Opponents of the death penalty have pointed to several questionable cases. In 1993, Ruben Cantu was executed in Texas for fatally shooting a man during a robbery. Years later, a second victim, who survived the shooting, told the Houston *Chronicle* that he had been pressured by police to identify Cantu as the gunman, even though he believed Cantu to be innocent. Sam Millsap, the district attorney in the case, who had once supported capital punishment ("I'm no wild-eyed, pointy-headed liberal"), said that he was disturbed by the thought that he had made a mistake.

In 1995, Larry Griffin was put to death in Missouri, for a drive-by shooting of a drug dealer. The case rested largely on the eyewitness testimony of a career criminal named Robert Fitzgerald, who had been an informant for prosecutors before and was in the witness-protection program. Fitzgerald maintained that he happened to be at the scene because his car had broken down. After Griffin's execution, a probe sponsored by the N.A.A.C.P.'s Legal Defense and Educational Fund revealed that a man who had been wounded during the incident insisted that Griffin was not the shooter. Moreover, the first police officer at the scene disputed that Fitzgerald had witnessed the crime.

These cases, however, stopped short of offering irrefutable proof that a "legally and factually innocent person" was executed. In 2005, a St. Louis prosecutor, Jennifer Joyce, launched an investigation of the Griffin case, upon being presented with what she called "compelling" evidence of Griffin's potential innocence. After two years of reviewing the evidence, and interviewing a new eyewitness, Joyce said that she and her team were convinced that the "right person was convicted."

Supreme Court Justice Antonin Scalia, in 2006, voted with a majority to uphold the death penalty in a Kansas case. In his opinion, Scalia declared that, in the modern judicial system, there has not been "a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops."

"My problems are simple," Willingham wrote Gilbert in September, 1999. "Try to keep them from killing me at all costs. End of story."

During his first years on death row, Willingham had pleaded with his lawyer, David Martin, to rescue him. "You can't imagine what it's like to be here, with people I have no business even being around," he wrote.

For a while, Willingham shared a cell with Ricky Lee Green, a serial killer, who castrated and fatally stabbed his victims, including a sixteen-year-old boy. (Green was executed in 1997.) Another of Willingham's cellmates, who had an I.Q. below seventy and the emotional development of an eight-year-old, was raped by an inmate. "You remember me telling you I had a new celly?" Willingham wrote in a letter to his parents. "The little retarded boy. . . . There was this guy here on the wing who is a shit sorry coward (who is the same one I got into it with a little over a month ago). Well, he raped [my cellmate] in the 3 row shower week before last." Willingham said that he couldn't believe that someone would "rape a boy who cannot even defend himself. Pretty damn low."

Because Willingham was known as a "baby killer," he was a target of attacks. "Prison is a rough place, and with a case like mine they never give you the benefit of a doubt," he wrote his parents. After he tried to fight one prisoner who threatened him, Willingham told a friend that if he hadn't stood up for himself several inmates would have "beaten me up or raped or"—his thought trailed off.

Over the years, Willingham's letters home became increasingly despairing. "This is a hard place, and it makes a person hard inside," he wrote. "I told myself that was one thing I did not want and that was for this place to make me bitter, but it is hard." He went on, "They have [executed] at least one person every month I have been here. It is senseless and brutal. . . . You see, we are not living in here, we are only existing." In 1996, he wrote, "I just been trying to figure out why after having a wife and 3 beautiful children that I loved my life has to end like this. And sometimes it just seems like it is not worth it all. . . . In the 3 1/2 years I been here I have never felt that my life was as worthless and desolate as it is now." Since the fire, he wrote, he had the sense that his life was slowly being erased. He obsessively looked at photographs of his children and Stacy, which he stored in his cell. "So long ago, so far away," he wrote in a poem. "Was everything truly there?"

Inmates on death row are housed in a prison within a prison, where there are no attempts at rehabilitation, and no educational or training programs. In 1999, after seven prisoners tried to escape from Huntsville, Willingham and four hundred and fifty-nine other inmates on death row were moved to a more secure facility, in Livingston, Texas. Willingham was held in isolation in a sixty-square-foot cell, twenty-three hours a day. He tried to distract himself by drawing—"amateur stuff," as he put it—and writing poems. In a poem about his children, he wrote, "There is nothing more beautiful than you on this earth." When Gilbert once suggested some possible revisions to his poems, he explained that he wrote them simply as expressions, however crude, of his feelings. "So to me to cut them up and try to improve on them just for creative-writing purposes would be to destroy what I was doing to start with," he said.

Despite his efforts to occupy his thoughts, he wrote in his diary that his mind "deteriorates each passing day." He stopped working out and gained weight. He questioned his faith: "No God who cared about his creation would abandon the innocent." He seemed not to care if another inmate attacked him. "A person who is already dead inside does not fear" death, he wrote.

One by one, the people he knew in prison were escorted into the execution chamber. There was Clifton Russell, Jr., who, at the age of eighteen, stabbed and beat a man to death, and who said, in his last statement, "I thank my Father, God in Heaven, for the grace he has granted me—I am ready." There was Jeffery Dean Motley, who kidnapped and fatally shot a woman, and who declared, in his final words, "I love you, Mom. Goodbye." And there was John Fearance, who murdered his neighbor, and who turned to God in his last moments and said, "I hope He will forgive me for what I done."

Willingham had grown close to some of his prison mates, even though he knew that they were guilty of brutal crimes. In March, 2000, Willingham's friend Ponchai Wilkerson—a twenty-eight-year-old who had shot and killed a clerk during a jewelry heist—was executed. Afterward, Willingham wrote in his diary that he felt "an emptiness that has not been touched since my children were taken from me." A year later, another friend who was about to be executed—"one of the few real people I have met here not caught up in the bravado of prison"—asked Willingham to make him a final drawing. "Man, I never thought drawing a simple Rose could be so emotionally hard," Willingham wrote. "The hard part is knowing that this will be the last thing I can do for him."

Another inmate, Ernest Ray Willis, had a case that was freakishly similar to Willingham's. In 1987, Willis had been convicted of setting a fire, in West Texas, that killed two women. Willis told investigators that he had been sleeping on a friend's living-room couch and woke up to a house full of smoke. He said that he tried to rouse one of the women, who was sleeping in another room, but the flames and smoke drove him back, and he ran out the front door before the house exploded with flames.

Witnesses maintained that Willis had acted suspiciously; he moved his car out of the yard, and didn't show "any emotion," as one volunteer firefighter put it. Authorities also wondered how Willis could have escaped the house without burning his bare feet. Fire investigators found pour patterns, puddle configurations, and other signs of arson. The authorities could discern no motive for the crime, but concluded that Willis, who had no previous record of violence, was a sociopath—a "demon," as the prosecutor put it. Willis was charged with capital murder and sentenced to death.

Willis had eventually obtained what Willingham called, enviously, a "bad-ass lawyer." James Blank, a noted patent attorney in New York, was assigned Willis's case as part of his firm's pro-bono work. Convinced that Willis was innocent, Blank devoted more than a dozen years to the case, and his firm spent millions, on fire consultants, private investigators, forensic experts, and the like. Willingham, meanwhile, relied on David Martin, his court-appointed lawyer, and one of Martin's colleagues to handle his appeals. Willingham often told his parents, "You don't know what it's like to have lawyers who won't even believe you're innocent." Like many inmates on death row, Willingham eventually filed a claim of inadequate legal representation. (When I recently asked Martin about his representation of Willingham, he said, "There were no grounds for reversal, and the verdict was absolutely the right one." He said of the case, "Shit, it's incredible that anyone's even thinking about it.")

Willingham tried to study the law himself, reading books such as "Tact in Court, or How Lawyers Win: Containing Sketches of Cases Won by Skill, Wit, Art, Tact, Courage and Eloquence." Still, he confessed to a friend, "The law is so complicated it is hard for me to understand." In 1996, he obtained a new court-appointed lawyer, Walter Reaves, who told me that he was appalled by the quality of Willingham's defense at trial and on appeal. Reaves prepared for him a state writ of habeas corpus, known as a Great Writ. In the byzantine appeals process of death-penalty cases, which frequently takes more than ten years, the writ is the most critical stage: a prisoner can introduce new evidence detailing such things as perjured testimony, unreliable medical experts, and bogus scientific findings. Yet most indigent inmates, like Willingham, who constitute the bulk of those on death row, lack the resources to track down new witnesses or dig up fresh evidence. They must depend on court-appointed lawyers, many of whom are "unqualified, irresponsible, or overburdened," as a study by the Texas Defender Service, a nonprofit organization, put it. In 2000, a Dallas *Morning News* investigation revealed that roughly a quarter of the inmates condemned to death in Texas were represented by court-appointed attorneys who had, at some point in their careers, been "reprimanded, placed on probation, suspended or banned from practicing law by the State Bar." Although Reaves was more competent, he had few resources to reinvestigate the case, and his writ introduced no new exculpatory evidence: nothing further about Webb, or the reliability of the eyewitness testimony, or the credibility of the medical experts. It focussed primarily on procedural questions, such as whether the trial court erred in its instructions to the jury.

The Texas Court of Criminal Appeals was known for upholding convictions even when overwhelming exculpatory evidence came to light. In 1997, DNA testing proved that sperm collected from a rape victim did not match Roy Criner, who had been sentenced to ninety-nine years for the crime. Two lower courts recommended that the verdict be overturned, but the Court of Criminal Appeals upheld it, arguing that Criner might have worn a condom or might not have ejaculated. Sharon Keller, who is now the presiding judge on the court, stated in a majority opinion, "The new evidence does not establish innocence." In 2000, George W. Bush pardoned Criner. (Keller was recently charged with judicial misconduct, for refusing to keep open past five o'clock a clerk's office in order to allow a last-minute petition from a man who was executed later that night.)

On October 31, 1997, the Court of Criminal Appeals denied Willingham's writ. After Willingham filed another writ of habeas corpus, this time in federal court, he was granted a temporary stay. In a poem, Willingham wrote, "One more chance, one more strike / Another bullet dodged, another date escaped."

Willingham was entering his final stage of appeals. As his anxieties mounted, he increasingly relied upon Gilbert to investigate his case and for emotional support. "She may never know what a change she brought into my life," he wrote in his diary. "For the first time in many years she gave me a purpose, something to look forward to."

As their friendship deepened, he asked her to promise him that she would never disappear without explanation. "I already have that in my life," he told her.

Together, they pored over clues and testimony. Gilbert says that she would send Reaves leads to follow up, but although he was sympathetic, nothing seemed to come of them.

In 2002, a federal district court of appeals denied Willingham's writ without even a hearing. "Now I start the last leg of my journey," Willingham wrote to Gilbert. "Got to get things in order."

He appealed to the U.S. Supreme Court, but in December, 2003, he was notified that it had declined to hear his case. He soon received a court order announcing that "the Director of the Department of Criminal Justice at Huntsville, Texas, acting by and through the executioner designated by said Director . . . is hereby DIRECTED and COMMANDED, at some hour after 6:00 p.m. on the 17th day of February, 2004, at the Department of Criminal Justice in Huntsville, Texas, to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of said Cameron Todd Willingham."

Willingham wrote a letter to his parents. "Are you sitting down?" he asked, before breaking the news. "I love you both so much," he said.

His only remaining recourse was to appeal to the governor of Texas, Rick Perry, a Republican, for clemency. The process, considered the last gatekeeper to the executioner, has been called by the U.S. Supreme Court "the 'fail safe' in our criminal justice system."

IV

One day in January, 2004, Dr. Gerald Hurst, an acclaimed scientist and fire investigator, received a file describing all the evidence of arson gathered in Willingham's case. Gilbert had come across Hurst's name and, along with one of Willingham's relatives, had contacted him, seeking his help. After their pleas, Hurst had agreed to look at the case pro bono, and Reaves, Willingham's lawyer, had sent him the relevant documents, in the hope that there were grounds for clemency.

Hurst opened the file in the basement of his house in Austin, which served as a laboratory and an office, and was cluttered with microscopes and diagrams of half-finished experiments. Hurst was nearly six and half feet tall, though his stooped shoulders made him seem considerably shorter, and he had a gaunt face that was partly shrouded by long gray hair. He was wearing his customary outfit: black shoes, black socks, a black T-shirt, and loose-fitting black pants supported by black suspenders. In his mouth was a wad of chewing tobacco.

A child prodigy who was raised by a sharecropper during the Great Depression, Hurst used to prowl junk yards, collecting magnets and copper wires in order to build radios and other contraptions. In the early sixties, he received a Ph.D. in chemistry from Cambridge University, where he started to experiment with fluorine and other explosive chemicals, and once detonated his lab. Later, he worked as the chief scientist on secret weapons programs for several American companies, designing rockets and deadly fire bombs—or what he calls "god-awful things." He helped patent what has been described, with only slight exaggeration, as "the world's most powerful nonnuclear explosive": an Astrolite bomb. He experimented with toxins so lethal that a fraction of a drop would rot human flesh, and in his laboratory he often had to wear a pressurized moon suit; despite such precautions, exposure to chemicals likely caused his liver to fail, and in 1994 he required a transplant. Working on what he calls "the dark side of arson," he retrofitted napalm bombs with Astrolite, and developed ways for covert operatives in Vietnam to create bombs from local materials, such as chicken manure and sugar. He also perfected a method for making an exploding T-shirt by nitrating its fibres.

His conscience eventually began pricking him. "One day, you wonder, What the hell am I doing?" he recalls. He left the defense industry, and went on to invent the Mylar balloon, an improved version of Liquid Paper, and Kinepak, a kind of explosive that reduces the risk of accidental detonation. Because of his extraordinary knowledge of fire and explosives, companies in civil litigation frequently sought his help in determining the cause of a blaze. By the nineties, Hurst had begun devoting significant time to criminal-arson cases, and, as he was exposed to the methods of local and state fire investigators, he was shocked by what he saw.

Many arson investigators, it turned out, had only a high-school education. In most states, in order to be certified, investigators had to take a forty-hour course on fire investigation, and pass a written exam. Often, the bulk of an investigator's training came on the job, learning from "old-timers" in the field, who passed down a body of wisdom about the telltale signs of arson, even though a study in 1977 warned that there was nothing in "the scientific literature to substantiate their validity."

In 1992, the National Fire Protection Association, which promotes fire prevention and safety, published its first scientifically based guidelines to arson investigation. Still, many arson investigators believed that what they did was more an art than a science—a blend of experience and intuition. In 1997, the International Association of Arson Investigators filed a legal brief arguing that arson sleuths should not be bound by a 1993 Supreme Court decision requiring experts who testified at trials to adhere to the scientific method. What arson sleuths did, the brief claimed, was "less scientific." By 2000, after the courts had rejected such claims, arson investigators increasingly recognized the scientific method, but there remained great variance in the field, with many practitioners still relying on the unverified techniques that had been used for generations. "People investigated fire largely with a flat-earth approach," Hurst told me. "It looks like arson—therefore, it's arson." He went on, "My view is you have to have a scientific basis. Otherwise, it's no different than witch-hunting."

In 1998, Hurst investigated the case of a woman from North Carolina named Terri Hinson, who was charged with setting a fire that killed her seventeen-month-old son, and faced the death penalty. Hurst ran a series of experiments re-creating the conditions of the fire, which suggested that it had not been arson, as the investigators had claimed; rather, it had started accidentally, from a faulty electrical wire in the attic. Because of this research, Hinson was freed. John Lentini, a fire expert and the author of a leading scientific textbook on arson, describes Hurst as "brilliant." A Texas prosecutor once told the Chicago *Tribune,* of Hurst, "If he says it was an arson fire, then it was. If he says it wasn't, then it wasn't."

Hurst's patents yielded considerable royalties, and he could afford to work pro bono on an arson case for months, even years. But he received the files on Willingham's case only a few weeks before Willingham was scheduled to be executed. As Hurst looked through the case records, a statement by Manuel Vasquez, the state deputy fire marshal, jumped out at him. Vasquez had testified that, of the roughly twelve hundred to fifteen hundred fires he had investigated, "most all of them" were arson. This was an oddly high estimate; the Texas State Fire Marshals Office typically found arson in only fifty per cent of its cases.

Hurst was also struck by Vasquez's claim that the Willingham blaze had "burned fast and hot" because of a liquid accelerant. The notion that a flammable or combustible liquid caused flames to reach higher temperatures had been repeated in court by arson sleuths for decades. Yet the theory was nonsense: experiments have proved that wood and gasoline-fuelled fires burn at essentially the same temperature.

Vasquez and Fogg had cited as proof of arson the fact that the front door's aluminum threshold had melted. "The only thing that can cause that to react is an accelerant," Vasquez said. Hurst was incredulous. A natural-wood fire can reach temperatures as high as two thousand degrees Fahrenheit—far hotter than the melting point for aluminum alloys, which ranges from a thousand to twelve hundred degrees. And, like many other investigators, Vasquez and Fogg mistakenly assumed that wood charring beneath the aluminum threshold was evidence that, as Vasquez put it, "a liquid accelerant flowed underneath and burned." Hurst had conducted myriad experiments showing that such charring was caused simply by the aluminum conducting so much heat. In fact, when liquid accelerant is poured under a threshold a fire will extinguish, because of a lack of oxygen. (Other scientists had reached the same conclusion.) "Liquid accelerants can no more burn under an aluminum threshold than can grease burn in a skillet even with a loose-fitting lid," Hurst declared in his report on the Willingham case.

Hurst then examined Fogg and Vasquez's claim that the "brown stains" on Willingham's front porch were evidence of "liquid accelerant," which had not had time to soak into the concrete. Hurst had previously performed a test in his garage, in which he poured charcoal-lighter fluid on the concrete floor, and lit it. When the fire went out, there were no brown stains, only smudges of soot. Hurst had run the same experiment many times, with different kinds of liquid accelerants, and the result was always the same. Brown stains were common in fires; they were usually composed of rust or gunk from charred debris that had mixed with water from fire hoses.

Another crucial piece of evidence implicating Willingham was the "crazed glass" that Vasquez had attributed to the rapid heating from a fire fuelled with liquid accelerant. Yet, in November of 1991, a team of fire investigators had inspected fifty houses in the hills of Oakland, California, which had been ravaged by brush fires. In a dozen houses, the investigators discovered crazed glass, even though a liquid accelerant had not been used. Most of these houses were on the outskirts of the blaze, where firefighters had shot streams of water; as the investigators later wrote in a published study, they theorized that the fracturing had been induced by rapid cooling, rather than by sudden heating—thermal shock had caused the glass to contract so quickly that it settled disjointedly. The investigators then tested this hypothesis in a laboratory. When they heated glass, nothing happened. But each time they applied water to the heated glass the intricate patterns appeared. Hurst had seen the same phenomenon when he had blowtorched and cooled glass during his research at Cambridge. In his report, Hurst wrote that Vasquez and Fogg's notion of crazed glass was no more than an "old wives' tale."

Hurst then confronted some of the most devastating arson evidence against Willingham: the burn trailer, the pour patterns and puddle configurations, the V-shape and other burn marks indicating that the fire had multiple points of origin, the burning underneath the children's beds. There was also the positive test for mineral spirits by the front door, and Willingham's seemingly implausible story that he had run out of the house without burning his bare feet.

As Hurst read through more of the files, he noticed that Willingham and his neighbors had described the windows in the front of the house suddenly exploding and flames roaring forth. It was then that Hurst thought of the legendary Lime Street Fire, one of the most pivotal in the history of arson investigation.

On the evening of October 15, 1990, a thirty-five-year-old man named Gerald Wayne Lewis was found standing in front of his house on Lime Street, in Jacksonville, Florida, holding his three-year-old son. His two-story wood-frame home was engulfed in flames. By the time the fire had been extinguished, six people were dead, including Lewis's wife. Lewis said that he had rescued his son but was unable to get to the others, who were upstairs.

When fire investigators examined the scene, they found the classic signs of arson: low burns along the walls and floors, pour patterns and puddle configurations, and a burn trailer running from the living room into the hallway. Lewis claimed that the fire had started accidentally, on a couch in the living room—his son had been playing with matches. But a V-shaped pattern by one of the doors suggested that the fire had originated elsewhere. Some witnesses told authorities that Lewis seemed too calm during the fire and had never tried to get help. According to the Los Angeles *Times*, Lewis had previously been arrested for abusing his wife, who had taken out a restraining order against him. After a chemist said that he had detected the presence of gasoline on Lewis's clothing and shoes, a report by the sheriff's office concluded, "The fire was started as a result of a petroleum product being poured on the front porch, foyer, living room, stairwell and second floor bedroom." Lewis was arrested and charged with six counts of murder. He faced the death penalty.

Subsequent tests, however, revealed that the laboratory identification of gasoline was wrong. Moreover, a local news television camera had captured Lewis in a clearly agitated state at the scene of the fire, and investigators discovered that at one point he had jumped in front of a moving car, asking the driver to call the Fire Department.

Seeking to bolster their theory of the crime, prosecutors turned to John Lentini, the fire expert, and John DeHaan, another leading investigator and textbook author. Despite some of the weaknesses of the case, Lentini told me that, given the classic burn patterns and puddle configurations in the house, he was sure that Lewis had set the fire: "I was prepared to testify and send this guy to Old Sparky"—the electric chair.

To discover the truth, the investigators, with the backing of the prosecution, decided to conduct an elaborate experiment and re-create the fire scene. Local officials gave the investigators permission to use a condemned house next to Lewis's home, which was about to be torn down. The two houses were virtually identical, and the investigators refurbished the condemned one with the same kind of carpeting, curtains, and furniture that had been in Lewis's home. The scientists also wired the building with heat and gas sensors that could withstand fire. The cost of the experiment came to twenty thousand dollars. Without using liquid accelerant, Lentini and DeHaan set the couch in the living room on fire, expecting that the experiment would demonstrate that Lewis's version of events was implausible.

The investigators watched as the fire quickly consumed the couch, sending upward a plume of smoke that hit the ceiling and spread outward, creating a thick layer of hot gases overhead—an efficient radiator of heat. Within three minutes, this cloud, absorbing more gases from the fire below, was banking down the walls and filling the living room. As the cloud approached the floor, its temperature rose, in some areas, to more than eleven hundred degrees Fahrenheit. Suddenly, the entire room exploded in flames, as the radiant heat ignited every piece of furniture, every curtain, every possible fuel source, even the carpeting. The windows shattered.

The fire had reached what is called “flashover”—the point at which radiant heat causes a fire in a room to become a room on fire. Arson investigators knew about the concept of flashover, but it was widely believed to take much longer to occur, especially without a liquid accelerant. From a single fuel source—a couch—the room had reached flashover in four and a half minutes.

Because all the furniture in the living room had ignited, the blaze went from a fuel-controlled fire to a ventilation-controlled fire—or what scientists call “post-flashover.” During post-flashover, the path of the fire depends on new sources of oxygen, from an open door or window. One of the fire investigators, who had been standing by an open door in the living room, escaped moments before the oxygen-starved fire roared out of the room into the hallway—a fireball that caused the corridor to go quickly into flashover as well, propelling the fire out the front door and onto the porch.

After the fire was extinguished, the investigators inspected the hallway and living room. On the floor were irregularly shaped burn patterns that perfectly resembled pour patterns and puddle configurations. It turned out that these classic signs of arson can also appear on their own, after flashover. With the naked eye, it is impossible to distinguish between the pour patterns and puddle configurations caused by an accelerant and those caused naturally by post-flashover. The only reliable way to tell the difference is to take samples from the burn patterns and test them in a laboratory for the presence of flammable or combustible liquids.

During the Lime Street experiment, other things happened that were supposed to occur only in a fire fuelled by liquid accelerant: charring along the base of the walls and doorways, and burning under furniture. There was also a V-shaped pattern by the living-room doorway, far from where the fire had started on the couch. In a small fire, a V-shaped burn mark may pinpoint where a fire began, but during post-flashover these patterns can occur repeatedly, when various objects ignite.

One of the investigators muttered that they had just helped prove the defense’s case. Given the reasonable doubt raised by the experiment, the charges against Lewis were soon dropped. The Lime Street experiment had demolished prevailing notions about fire behavior. Subsequent tests by scientists showed that, during post-flashover, burning under beds and furniture was common, entire doors were consumed, and aluminum thresholds melted.

John Lentini says of the Lime Street Fire, "This was my epiphany. I almost sent a man to die based on theories that were a load of crap."

Hurst next examined a floor plan of Willingham's house that Vasquez had drawn, which delineated all the purported pour patterns and puddle configurations. Because the windows had blown out of the children's room, Hurst knew that the fire had reached flashover. With his finger, Hurst traced along Vasquez's diagram the burn trailer that had gone from the children's room, turned right in the hallway, and headed out the front door. John Jackson, the prosecutor, had told me that the path was so "bizarre" that it had to have been caused by a liquid accelerant. But Hurst concluded that it was a natural product of the dynamics of fire during post-flashover. Willingham had fled out the front door, and the fire simply followed the ventilation path, toward the opening. Similarly, when Willingham had broken the windows in the children's room, flames had shot outward.

Hurst recalled that Vasquez and Fogg had considered it impossible for Willingham to have run down the burning hallway without scorching his bare feet. But if the pour patterns and puddle configurations were a result of a flashover, Hurst reasoned, then they were consonant with Willingham's explanation of events. When Willingham exited his bedroom, the hallway was not yet on fire; the flames were contained within the children's bedroom, where, along the ceiling, he saw the "bright lights." Just as the investigator safely stood by the door in the Lime Street experiment seconds before flashover, Willingham could have stood close to the children's room without being harmed. (Prior to the Lime Street case, fire investigators had generally assumed that carbon monoxide diffuses quickly through a house during a fire. In fact, up until flashover, levels of carbon monoxide can be remarkably low beneath and outside the thermal cloud.) By the time the Corsicana fire achieved flashover, Willingham had already fled outside and was in the front yard.

Vasquez had made a videotape of the fire scene, and Hurst looked at the footage of the burn trailer. Even after repeated viewings, he could not detect three points of origin, as Vasquez had. (Fogg recently told me that he also saw a continuous trailer and disagreed with Vasquez, but added that nobody from the prosecution or the defense ever asked him on the stand about his opinion on the subject.)

After Hurst had reviewed Fogg and Vasquez's list of more than twenty arson indicators, he believed that only one had any potential validity: the positive test for mineral spirits by the threshold of the front door. But why had the fire investigators obtained a positive reading only in that location? According to Fogg and Vasquez's theory of the crime, Willingham had poured accelerant throughout the children's bedroom and down the hallway. Officials had tested extensively in these areas—including where all the pour patterns and puddle configurations were—and turned up nothing. Jackson told me that he "never did understand why they weren't able to recover" positive tests in these parts.

Hurst found it hard to imagine Willingham pouring accelerant on the front porch, where neighbors could have seen him. Scanning the files for clues, Hurst noticed a photograph of the porch taken before the fire, which had been entered into evidence. Sitting on the tiny porch was a charcoal grill. The porch was where the family barbecued. Court testimony from witnesses confirmed that there had been a grill, along with a container of lighter fluid, and that both had burned when the fire roared onto the porch during post-flashover. By the time Vasquez inspected the house, the grill had been removed from the porch, during cleanup. Though he cited the container of lighter fluid in his report, he made no mention of the grill. At the trial, he insisted that he had never been told of the grill's earlier placement. Other authorities were aware of the grill but did not see its relevance. Hurst, however, was convinced that he had solved the mystery: when firefighters had blasted the porch with water, they had likely spread charcoal-lighter fluid from the melted container.

Without having visited the fire scene, Hurst says, it was impossible to pinpoint the cause of the blaze. But, based on the evidence, he had little doubt that it was an accidental fire—one caused most likely by the space heater or faulty electrical wiring. It explained why there had never been a motive for the crime. Hurst concluded that there was no evidence of arson, and that a man who had already lost his three children and spent twelve years in jail was about to be executed based on "junk science." Hurst wrote his report in such a rush that he didn't pause to fix the typos.

V

"I am a realist and I will not live a fantasy," Willingham once told Gilbert about the prospect of proving his innocence. But in February, 2004, he began to have hope.

Hurst's findings had helped to exonerate more than ten people. Hurst even reviewed the scientific evidence against Willingham's friend Ernest Willis, who had been on death row for the strikingly similar arson charge. Hurst says, "It was like I was looking at the same case. Just change the names." In his report on the Willis case, Hurst concluded that not "a single item of physical evidence . . . supports a finding of arson." A second fire expert hired by Ori White, the new district attorney in Willis's district, concurred. After seventeen years on death row, Willis was set free. "I don't turn killers loose," White said at the time. "If Willis was guilty, I'd be retrying him right now. And I'd use Hurst as my witness. He's a brilliant scientist." White noted how close the system had come to murdering an innocent man. "He did not get executed, and I thank God for that," he said.

On February 13th, four days before Willingham was scheduled to be executed, he got a call from Reaves, his attorney. Reaves told him that the fifteen members of the Board of Pardons and Paroles, which reviews an application for clemency and had been sent Hurst's report, had made their decision.

"What is it?" Willingham asked.

"I'm sorry," Reaves said. "They denied your petition."

The vote was unanimous. Reaves could not offer an explanation: the board deliberates in secret, and its members are not bound by any specific criteria. The board members did not even have to review Willingham's materials, and usually don't debate a case in person; rather, they cast their votes by fax—a process that has become known as "death by fax." Between 1976 and 2004, when Willingham filed his petition, the State of Texas had approved only one application for clemency from a prisoner on death row. A Texas appellate judge has called the clemency system "a legal fiction." Reaves said of the board members, "They never asked me to attend a hearing or answer any questions."

The Innocence Project obtained, through the Freedom of Information Act, all the records from the governor's office and the board pertaining to Hurst's report. "The documents show that they received the report, but neither office has any record of anyone acknowledging it, taking note of its significance, responding to it, or calling any attention to it within the government," Barry Scheck said. "The only reasonable conclusion is that the governor's office and the Board of Pardons and Paroles ignored scientific evidence."

LaFayette Collins, who was a member of the board at the time, told me of the process, "You don't vote guilt or innocence. You don't retry the trial. You just make sure everything is in order and there are no glaring errors." He noted that although the rules allowed for a hearing to consider important new evidence, "in my time there had never been one called." When I asked him why Hurst's report didn't constitute evidence of "glaring errors," he said, "We get all kinds of reports, but we don't have the mechanisms to vet them." Alvin Shaw, another board member at the time, said that the case didn't "ring a bell," adding, angrily, "Why would I want to talk about it?" Hurst calls the board's actions "unconscionable."

Though Reaves told Willingham that there was still a chance that Governor Perry might grant a thirty-day stay, Willingham began to prepare his last will and testament. He had earlier written Stacy a letter apologizing for not being a better husband and thanking her for everything she had given him, especially their three daughters. "I still know Amber's voice, her smile, her cool Dude saying and how she said: I wanna hold you! Still feel the touch of Karmon and Kameron's hands on my face." He said that he hoped that "some day, somehow the truth will be known and my name cleared."

He asked Stacy if his tombstone could be erected next to their children's graves. Stacy, who had for so long expressed belief in Willingham's innocence, had recently taken her first look at the original court records and arson findings. Unaware of Hurst's report, she had determined that Willingham was guilty. She denied him his wish, later telling a reporter, "He took my kids away from me."

Gilbert felt as if she had failed Willingham. Even before his pleas for clemency were denied, she told him that all she could give him was her friendship. He told her that it was enough "to be a part of your life in some small way so that in my passing I can know I was at last able to have felt the heart of another who might remember me when I'm gone." He added, "There is nothing to forgive you for." He told her that he would need her to be present at his execution, to help him cope with "my fears, thoughts, and feelings."

On February 17th, the day he was set to die, Willingham's parents and several relatives gathered in the prison visiting room. Plexiglas still separated Willingham from them. "I wish I could touch and hold both of you," Willingham had written to them earlier. "I always hugged Mom but I never hugged Pop much."

As Willingham looked at the group, he kept asking where Gilbert was. Gilbert had recently been driving home from a store when another car ran a red light and smashed into her. Willingham used to tell her to stay in her kitchen for a day, without leaving, to comprehend what it was like to be confined in prison, but she had always found an excuse not to do it. Now she was paralyzed from the neck down.

While she was in an intensive-care unit, she had tried to get a message to Willingham, but apparently failed. Gilbert's daughter later read her a letter that Willingham had sent her, telling her how much he had grown to love her. He had written a poem: "Do you want to see beauty—like you have never seen? / Then close your eyes, and open your mind, and come along with me."

Gilbert, who spent years in physical rehabilitation, gradually regaining motion in her arms and upper body, says, "All that time, I thought I was saving Willingham, and I realized then that he was saving me, giving me the strength to get through this. I know I will one day walk again, and I know it is because Willingham showed me the kind of courage it takes to survive."

Willingham had requested a final meal, and at 4 P.M. on the seventeenth he was served it: three barbecued pork ribs, two orders of onion rings, fried okra, three beef enchiladas with cheese, and two slices of lemon cream pie. He received word that Governor Perry had refused to grant him a stay. (A spokesperson for Perry says, "The Governor made his decision based on the facts of the case.") Willingham's mother and father began to cry. "Don't be sad, Momma," Willingham said. "In fifty-five minutes, I'm a free man. I'm going home to see my kids." Earlier, he had confessed to his parents that there was one thing about the day of the fire he had lied about. He said that he had never actually crawled into the children's room. "I just didn't want people to think I was a coward," he said. Hurst told me, "People who have never been in a fire don't understand why those who survive often can't rescue the victims. They have no concept of what a fire is like."

The warden told Willingham that it was time. Willingham, refusing to assist the process, lay down; he was carried into a chamber eight feet wide and ten feet long. The walls were painted green, and in the center of the room, where an electric chair used to be, was a sheeted gurney. Several guards strapped Willingham down with leather belts, snapping buckles across his arms and legs and chest. A medical team then inserted intravenous tubes into his arms. Each official had a separate role in the process, so that no one person felt responsible for taking a life.

Willingham had asked that his parents and family not be present in the gallery during this process, but as he looked out he could see Stacy watching. The warden pushed a remote control, and sodium thiopental, a barbiturate, was pumped into Willingham's body. Then came a second drug, pancuronium bromide, which paralyzes the diaphragm, making it impossible to breathe. Finally, a third drug, potassium chloride, filled his veins, until his heart stopped, at 6:20 P.M. On his death certificate, the cause was listed as "Homicide."

After his death, his parents were allowed to touch his face for the first time in more than a decade. Later, at Willingham's request, they cremated his body and secretly spread some of his ashes over his children's graves. He had told his parents, "Please don't ever stop fighting to vindicate me."

In December, 2004, questions about the scientific evidence in the Willingham case began to surface. Maurice Possley and Steve Mills, of the Chicago *Tribune*, had published an investigative series on flaws in forensic science; upon learning of Hurst's report, Possley and Mills asked three fire experts, including John Lentini, to examine the original investigation. The experts concurred with Hurst's report. Nearly two years later, the Innocence Project commissioned Lentini and three other top fire investigators to conduct an independent review of the arson evidence in the Willingham case. The panel concluded that "each and every one" of the indicators of arson had been "scientifically proven to be invalid."

In 2005, Texas established a government commission to investigate allegations of error and misconduct by forensic scientists. The first cases that are being reviewed by the commission are those of Willingham and Willis. In mid-August, the noted fire scientist Craig Beyler, who was hired by the commission, completed his investigation. In a scathing report, he concluded that investigators in the Willingham case had no scientific basis for claiming that the fire was arson, ignored evidence that contradicted their theory, had no comprehension of flashover and fire dynamics, relied on discredited folklore, and failed to eliminate potential accidental or alternative causes of the fire. He said that Vasquez's approach seemed to deny "rational reasoning" and was more "characteristic of mystics or psychics." What's more, Beyler determined that the investigation violated, as he put it to me, "not only the standards of today but even of the time period." The commission is reviewing his findings, and plans to release its own report next year. Some legal scholars believe that the commission may narrowly assess the reliability of the scientific evidence. There is a chance, however, that Texas could become the first state to acknowledge officially that, since the advent of the modern judicial system, it had carried out the "execution of a legally and factually innocent person."

Just before Willingham received the lethal injection, he was asked if he had any last words. He said, "The only statement I want to make is that I am an innocent man convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do. From God's dust I came and to dust I will return, so the Earth shall become my throne." ♦

This article appears in the print edition of the September 7, 2009, issue.

David Grann, a staff writer at The New Yorker since 2003, is the author of, most recently, "The White Darkness," and of "Killers of the Flower Moon: The Osage Murders and the Birth of the F.B.I.," which won an Edgar Award and was a finalist for the National Book Award. *Read more »*

NBC NEWS

U.S. NEWS

Epic Drug Lab Scandal Results in More Than 20,000 Convictions Dropped

Former state chemist Annie Dookhan sits in Suffolk Superior Court in Boston before entering a guilty plea on charges of obstruction of justice, perjury and tampering with evidence on Nov. 22, 2013.
David L. Ryan / Boston Globe via AP, file

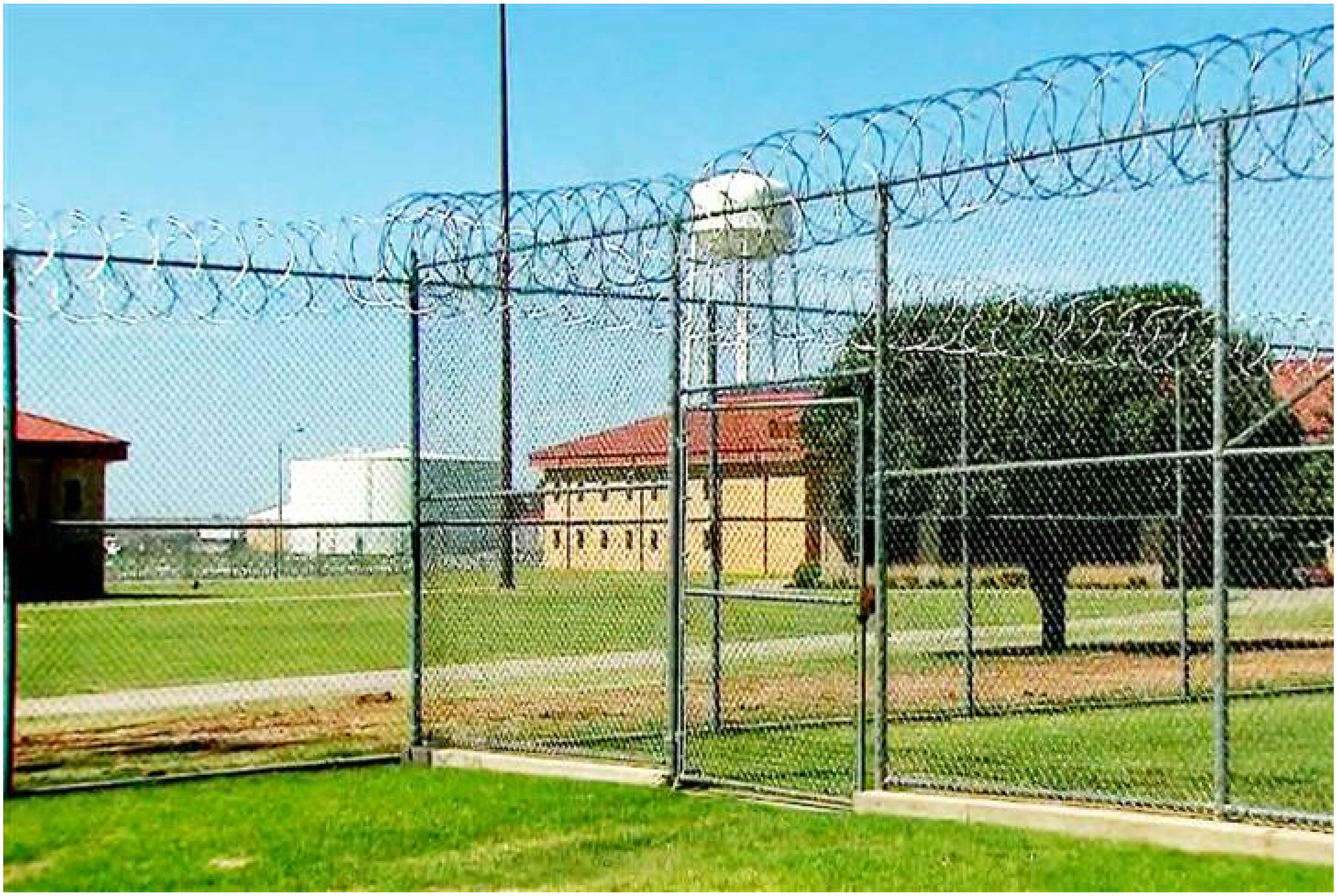
April 18, 2017, 5:30 PM EDT / Updated April 18, 2017, 10:50 PM EDT

By Jon Schuppe

A mass dismissal of wrongful convictions — perhaps the biggest ever — unfolded in a Boston courthouse on Tuesday, as prosecutors in seven Massachusetts counties dropped more than 21,000 low-level drug cases tainted by the work of a rogue lab chemist.

The number of corrupted convictions was so unwieldy that the district attorneys used compact discs to deliver lists of cases they were dropping and those they believed they could successfully re-prosecute.

By day's end, just a few hundred cases involving the disgraced chemist, Annie Dookhan, remained. The exact number may not be clear until Wednesday, when the court finishes processing the lists. The American Civil Liberties Union of Massachusetts, which fought for the dismissals, did its own tally and came up with 320 cases dropped from a total 21,907.



[20,000 Convictions Dropped After Massive Drug Lab Scandal]

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Defense lawyers hailed the dismissals as a triumph over a system that valued convictions over due process.

"This was a mistake that comes from the war on drugs," said Carl Williams, an ACLU lawyer.

Annie Dookhan is escorted to a cruiser outside her home in Franklin, Massachusetts, in 2012.

Bizuayehu Tesfaye / AP, file

Prosecutors said they decided to re-prosecute defendants with lengthy criminal histories. But they also stressed that the abandoned cases involved people with long records and those who likely committed the offenses for which they were convicted — often as the result of more serious crimes. Most pleaded guilty before Dookhan's misdeeds came to light in 2012, prosecutors said.

“If there had been evidence that any of these defendants was actually innocent, we would not have hesitated to dismiss the case outright and exonerate the defendant immediately,” Daniel Conley, the district attorney in Suffolk County, which includes Boston, said in a statement.

Conley said he'd decided to pursue 117 of the 15,570 cases undermined by Dookhan's work.

Related: **Stunning’ Drug Lab Scandal Could Overturn 23,000 Convictions**

The dismissals capped a five-year legal fight, longer than it took to discover, prosecute and punish Dookhan, who worked at the William A. Hinton State Laboratory Institute in Boston. She admitted to tampering with evidence, forging test results and lying about it. The former lab tech served three years in prison before being released last year.

The William A. Hinton State Laboratory Institute in Boston in 2012. Steven Senne / AP, file

Why Dookhan did it remains somewhat of a mystery. Investigators and former colleagues have said the Trinidadian immigrant seemed driven by a compulsion to overachieve, even if it meant making things up or cutting corners. She became the lab's most prolific analyst, a record that impressed her supervisors but also worried her co-workers – a concern that went overlooked, investigators found.

The prosecutors fought for a way to preserve the convictions, and leave it to the defendants to challenge them. But civil rights groups and defense lawyers argued for all the cases to be dropped, saying that was the only way to ensure justice. In January, the state's high court chose its own solution, ruling that district attorneys should focus on a small subset of cases it wanted to retry, and drop the rest.

"Some are having their case dismissed because we believe that the integrity of the system of justice is more important than their conviction."

The prosecutors delivered their answers individually Tuesday at the Suffolk County Courthouse in Boston.

Bristol County District Attorney Thomas Quinn III, from south of Boston, said that he would pursue 112 of more than 1,500 cases in which drugs were analyzed by Dookhan.

In Essex County, north of the city, authorities dropped 5,160 cases and said it would re-prosecute 55, authorities said.

Cape & Islands District Attorney Michael O'Keefe said his office would keep one case and drop 1,067.

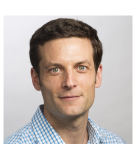
"Some are having their case dismissed because we believe that the integrity of the system of justice is more important than their conviction," O'Keefe said in a statement. "Others whose cases are of significance and can be proven independent of the actions of this chemist will not be dismissed."

But defense lawyers and civil rights advocates said the dubious convictions made it difficult for defendants to find jobs and housing or to obtain student loans. Some defendants were convicted of more serious crimes, and the drug convictions were used to stiffen their sentences, the lawyers say. In other cases, non-citizens were threatened with deportation.

Lab scandals have undermined thousands of convictions in eight states in the past decade, according to data maintained by the National Association of Criminal Defense Lawyers. The Dookhan case isn't the only one riling Massachusetts; a second scandal, at a second lab, involving a chemist who admitted to doing drugs while on the job, has threatened thousands more convictions.

The Dookhan case has also illuminated an effort to tighten up operations at America's criminal drug labs. As the criminal justice system has grown more reliant on the work of forensic laboratories, scientists have pressed for all labs to be professionally accredited, a process that would require outside reviews — steps that experts say could have identified Dookhan's misdeeds much earlier.

"I think the situation might have been different at an accredited lab because there would have been more eyes looking," said Jack Mario, a retired seized-drug laboratory chemist who acted as a consultant in the Dookhan investigation.



Jon Schuppe

Jon Schuppe writes about crime, justice and related matters for NBC News.

Julmary Zambrano contributed.

BLOOD WILL TELL

Blood-Spatter Expert in Joe Bryan Case Says "My Conclusions Were Wrong"

The expert whose testimony was key to Bryan's conviction for his wife's 1985 murder says he now believes that some of his techniques were incorrect. His admission comes as a judge considers whether Bryan, whose case was the subject of a ProPublica and New York Times Magazine investigation, should get a new trial.

by Pamela Colloff, Sept. 17, 2018, 7:49 p.m. EDT

A hearing to determine whether Joe Bryan should be granted a new trial came to a dramatic conclusion on Monday with a surprise, eleventh-hour admission from the expert witness whose testimony had proved critical in convicting the former high school principal of the 1985 murder of his wife, Mickey.

"My conclusions were wrong," retired police Detective Robert Thorman wrote in an affidavit introduced by the defense of the bloodstain-pattern analysis he performed. "Some of the techniques and methodology were incorrect. Therefore, some of my testimony was not correct."

Bloodstain-pattern analysis is a forensic discipline whose practitioners regard the drops, spatters and trails of blood at a crime scene as clues, which can sometimes be used to reverse-engineer the crime itself. Thorman had only 40 hours of training in the discipline when he was called in to work on the Bryan case. His testimony about a blood-speckled flashlight that Mickey's brother found in the trunk of Bryan's car four days after the murder made the state's tenuous theory of the crime seem plausible.

At Bryan's trial in 1986 and then again at his 1989 retrial, Thorman testified that tiny flecks of blood on the flashlight could only be "back spatter" — a pattern that indicated a close-range shooting. What connection the flashlight had to the crime, if any, was never clear; in 1985, a crime lab chemist found that the blood on it was type O, which corresponded not only to Mickey but to nearly half the population. But Thorman effectively tied the flashlight to the crime scene, going so far as to say that the killer had likely held the flashlight in one hand while firing a pistol with the other.

Bryan had been attending a principals' convention in Austin, 120 miles from where the murder occurred in Clifton, Texas, in the days surrounding the murder. He has always maintained that he was in Austin, asleep in his hotel room, at the time of the crime.

During both trials, Thorman also helped explain away one of the biggest holes in the state's case: no blood was ever found in the interior of Bryan's Mercury, though the prosecution alleged that Bryan fled the messy crime scene in his car. Thorman provided an explanation for this, asserting that the killer had changed his clothes and shoes in the master bathroom of the Bryan home before making his escape.

"In no way did I lie in my report or testimony," Thorman stated in his affidavit, which is dated Sept. 13. "I was doing what I thought was correct as a result of my training at the time." Thorman, who is now 80, did not specify which parts of his testimony had been incorrect.

The affidavit was read aloud on the stand by Montgomery County crime scene investigator Celestina Rossi, who had previously challenged the accuracy of Thorman's analysis. Prosecutors, who glanced at each other repeatedly as she read the affidavit, appeared taken off guard.

In May, Bryan's case was the subject of a two-part investigation by ProPublica *<https://features.propublica.org/blood-spatter/mickey-bryan-murder-blood-spatter-forensic-evidence/>* and The New York Times Magazine *<https://www.nytimes.com/interactive/2018/05/23/magazine/joe-bryan-blood-forensics-murder.html>*, which questioned the accuracy of the bloodstain-pattern analysis used to convict him. The series highlighted the scant training *<https://features.propublica.org/blood-spatter/joe-bryan-conviction-blood-spatter-forensic-evidence/>* of some law enforcement officers, who nevertheless go on to testify in criminal cases as expert witnesses.

In July, Bryan's case commanded the attention of the forensics community when the Texas Forensic Science Commission — which investigates complaints about the misuse of forensic testimony and evidence in criminal cases — announced that the blood-spatter analysis used to convict him was "not accurate or scientifically supported." *<https://www.propublica.org/article/texas-forensic-science-commission-blood-spatter-evidence-testimony-murder-case-joe-bryan>*

Then, on Aug. 20, the evidentiary hearing got underway in the central Texas town of Comanche. For three days, Bryan's attorneys presented a succession of witnesses who testified that the bloodstain-pattern analysis used to convict Bryan was faulty, and that new evidence pointed to an alternative suspect in the killing <https://www.propublica.org/article/joe-bryans-attorneys-ask-for-new-trial-say-murder-conviction-built-on-faulty-forensics>, a now-deceased Clifton police officer named Dennis Dunlap.

On Aug. 22, Judge Doug Shaver declared an extended recess so that DNA testing could be performed on the flashlight.

At the hearing on Monday, Brent Watson, a DNA analyst with the Texas Department of Public Safety Crime Lab in Waco, took the stand to testify about the results of his examination. Watson explained that he tested six minute stains on the flashlight. Five of those stains came back negative for the presence of blood. The sixth stain tested positive, but whose blood it was could not be determined.

A partial DNA profile on the lens of the flashlight yielded little information. Whether or not Mickey was a contributor to that profile, Watson said, was inconclusive. “Degradation had an effect on my ability to obtain complete DNA profiles,” he said of the 32-year-old evidence.

Watson, however, was able to glean more information from a partial DNA profile he developed by swabbing the handle of the flashlight for DNA. “Joe and Mickey were excluded as contributors,” he said.

Jessica Freud, one of Bryan’s attorneys, seized on these uncertainties, asking Watson, “Is the state of Texas able to show that Mickey’s blood or DNA is present on the flashlight?”

“No, it is not,” Watson replied.

Watson went on to testify about another notorious piece of evidence from Bryan’s two trials: a pair of Bryan’s discarded underwear, which was found in the couple’s master bathroom wastebasket during the 1985 investigation. At that time, a state crime lab analyst determined that the underwear was stained with semen that matched Bryan’s blood type, and she testified to this fact at both trials. But current testing protocols, Watson said, showed no evidence of semen on the underwear.

The semen-stained underwear had been used to great effect by the prosecution at both of Bryan’s trials. At Bryan’s first trial, the Bosque County district attorney at the time, Andy McMullen, had argued that it was “evidence of a kind of perverted behavior.” The prosecution had always insinuated, Freud told the court, that Bryan had been aroused by the act of killing his wife.

By the close of the hearing, there appeared to be little left of the state’s case. No one could say whose blood was on the flashlight, how that blood had been deposited or when the blood was left there. Nor was it any clearer who had put the flashlight in the trunk of Bryan’s Mercury and when. No semen was found to be present on the underwear. Thorman’s bloodstain-pattern analysis had been debunked.

In his closing arguments, the current Bosque County DA, Adam Sibley, focused on two plastic particles that were found on the flashlight lens. At both trials, an investigator and a crime lab technician had testified that the particles possessed the same characteristics as birdshot shell fragments found at the crime scene. These particles, Sibley said, "proved the flashlight was at the scene of the crime." Sibley noted that neither Tom Bevel, the state's bloodstain-pattern analyst, nor Rossi, the defense's expert, could "eliminate the flashlight from the scene."

When Freud rose to address the courtroom, she ticked off the lengthy list of questionable evidence and odd circumstances that had allowed Bryan to be convicted, twice, of his wife's murder: The bad science. The flashlight that had been allowed into evidence even though no chain of custody had ever been established. The underwear that was not actually stained with semen. The special prosecutor paid for by Mickey's brother, Charlie Blue, even though Blue, because he discovered the flashlight, was the case's star witness. "It not only gives the appearance of impropriety, it is improper," Freud said.

She argued that jurors in Bryan's trials had never heard compelling evidence that suggested Dunlap, who hanged himself in 1996, could have killed Mickey. After his death, Clifton police launched an investigation in which they determined that he had killed a 17-year-old high school student named Judy Whitley just four months before Mickey's murder. During that inquiry, an ex-wife of Dunlap's told investigators that he had boasted of being with the principal's wife on the night she died. Freud played a brief portion of that interview aloud, and spectators in the crowded courtroom strained to listen.

"There is nothing left," Freud said of the state's case, in closing. "There is nothing left here."

A new trial, she said, should be devoid of faulty bloodstain-pattern analysis and irrelevant evidence, like the underwear; it should not be tried by a special prosecutor paid for by the victim's family; and it should "permit a full and fair presentation of all of the exculpatory evidence to a jury." She added: "If they're going to retry him, make them do it the right way. They've never done it the right way."

Before she concluded, she turned to Shaver. "Joe was in Austin," she said, her voice rising with emotion. "He never left. He is innocent. Always has been."

The case will be on hold until Nov. 9, when the state and defense will present their written conclusions about the hearing to Shaver. The judge will then recommend to the Texas Court of Criminal Appeals whether Bryan should receive a new trial. That court's justices will be the final arbiters.

Many of Bryan’s supporters who crowded the courtroom on Monday — from his former high school students to ex-Clifton Record editor Leon Smith, who has spent decades chronicling Bryan’s case — were disappointed that a potential resolution would be further postponed. Bryan had listened attentively throughout the hearing, sitting behind his attorneys in a black-and-white prison jumpsuit, but he looked deflated at the news, his shoulders sagging at the thought of yet another delay. Bryan, who suffers from congestive heart failure, will turn 78 on Friday.

“How much longer will he have to wait?” said the Rev. Carroll Pickett, who served as the prison chaplain for Texas’ death row for more than a dozen years, as he stood outside the Comanche County Courthouse. “I’ve known Joe for 31 years, and I have yet to hear any evidence that he committed this crime.”

Filed under: Criminal Justice *<https://www.propublica.org/topics/criminal-justice>*

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Adrià Fruitós, special to ProPublica

The FBI Says Its Photo Analysis Is Scientific Evidence. Scientists Disagree.

The bureau's image unit has linked defendants to crime photographs for decades using unproven techniques and baseless statistics. Studies have begun to raise doubts about the unit's methods.

by Ryan Gabrielson, Jan. 17, 5 a.m. EST

At the FBI Laboratory in Quantico, Virginia, a team of about a half-dozen technicians analyzes pictures down to their pixels, trying to determine if the faces, hands, clothes or cars of suspects match images collected by investigators from cameras at crime scenes.

The unit specializes in visual evidence and facial identification, and its examiners can aid investigations by making images sharper, revealing key details in a crime or ruling out potential suspects.

But the work of image examiners has never had a strong scientific foundation, and the FBI's endorsement of the unit's findings as trial evidence troubles many experts and raises anew questions about the role of the FBI Laboratory as a standard-setter in forensic science.

FBI examiners have tied defendants to crime pictures in thousands of cases over the past half-century using unproven techniques, at times giving jurors baseless statistics to say the risk of error was vanishingly small. Much of the legal foundation for the unit's work is rooted in a 22-year-old comparison of bluejeans. Studies on several photo comparison techniques, conducted over the last decade by the FBI and outside scientists, have found they are not reliable.

A side-by-side photo comparison of bluejeans from a 1996 robbery and bombing case published with an article on the bureau's clothes identification method. (Journal of Forensic Sciences)

Since those studies were published, there's no indication that lab officials have checked past casework for errors or inaccurate testimony. Image examiners continue to use disputed methods in an array of cases to bolster prosecutions against people accused of robberies, murder, sex crimes and terrorism.

The work of image examiners is a type of pattern analysis, a category of forensic science that has repeatedly led to misidentifications at the FBI and other crime laboratories. Before the discovery of DNA identification methods in the 1980s, most of the bureau's lab worked in pattern matching, which involves comparing features from items of evidence to the suspect's body and belongings.

Examiners had long testified in court that they could determine what fingertip left a print, what gun fired a bullet, which scalp grew a hair "to the exclusion of all others." Research and exonerations by DNA analysis have repeatedly disproved these claims, and the U.S. Department of Justice no longer allows technicians and scientists from the FBI and other agencies to make such unequivocal statements, according to new testimony guidelines released last year.

Though image examiners rely on similarly flawed methods, they have continued to testify to and defend their exactitude, according to a review of court records and examiners' written reports and published articles.

ProPublica asked leading statisticians and forensic science experts to review methods image examiners have detailed in court transcripts, published articles and presentations. The experts identified numerous instances of examiners overstating the techniques' scientific precision and said some of their assertions defy logic.

The FBI declined repeated requests for interviews with members of the image group, which is formally known as the Forensic Audio, Video and Image Analysis Unit.

ProPublica provided the bureau written questions in September and followed up in November with a summary of our reporting on the bureau's photo comparison practices. The FBI provided a brief prepared response last month that said the image unit's techniques differ from those discredited in recent studies. It said image examiners have never relied on those methods "because they have been demonstrated to be unreliable."

But the unit's articles and presentations on photo comparison show its practices mirror those used in the studies.

The bureau did not address examiners' inaccurate testimony and other questionable practices.

Judge Jed Rakoff of the United States District Court in Manhattan, a former member of the National Commission on Forensic Science, said the weakest pattern analysis fields rely more on examiner intuition than science. Their conclusions are, basically, "my hunch is that X is a match for Y," he said. "Only they don't say hunch."

Rakoff said that image analysis hadn't come before him in court and wasn't taken up by the commission but said that investigators, prosecutors and judges should make sure evidence is reliable before using it.

Scandals involving other areas of forensic science have shown the danger of waiting for injustices to become public to compel reform, Rakoff said.

Read More

"How many cases of innocent people being wrongly convicted have to occur before people realize that there's a

Blood Will Tell, Part I
The murder of Mickey Bryan, a quiet fourth-grade teacher, stunned her small Texas town. Then her husband, a beloved high school principal, was charged with killing her. Did he do it, or had there been a terrible mistake?

Blood Will Tell, Part II
Joe Bryan has spent the past three decades in prison for the murder of his wife, a crime he claims he didn't commit. His conviction rested largely on "bloodstain-pattern analysis" — a technique still in use throughout the criminal-justice system, despite concerns about its reliability.

very broad spectrum of forensic science?" Rakoff asked. "Some of it is very good, like DNA. Some of it is pretty good, like fingerprinting. And some of it is not good at all."

Details on FBI caseloads and testimony are not readily available to the public. As such, there is no way to determine exactly how often image examiners testify and when their photo comparisons serve as central evidence in prosecutions. In court, examiners have said they analyze photos in hundreds of cases a year, according to trial transcripts.

To try to identify some of those cases, ProPublica searched court databases and found more than two dozen criminal cases since 2000 in which documents mentioned the FBI's image examiners, nearly all cases that were appealed and thus had a substantial written record. Few criminal convictions, though, make it to an appeal.

None of the appealed cases led to judges reversing convictions, nor has evidence emerged to show that the defendants were innocent. Still, flaws in forensic science techniques often emerge decades after they've been allowed by judges and been used to secure convictions.

The problems with the FBI's photo comparison work plague other subjective types of forensic science, such as fingerprint analysis, microscopic hair fiber examination and handwriting analysis, said Itiel Dror, a neuroscientist who trains U.S. law enforcement on cognitive bias in crime laboratories. Dror is a researcher at University College London, frequently teaching at agencies like the FBI and New York Police Department on ways to minimize personal beliefs from influencing casework.

Even DNA analysis can be swayed by bias, Dror said. But pattern-matching fields like image analysis are especially vulnerable. Image examiners' lab work is, generally, only seeing if evidence from a suspect "matches" that from a crime scene.

"Many of them are more concerned by what the court accepts as science rather than being motivated by science itself," Dror said.

A Plaid Shirt, and Staggering Odds

The image unit has characterized its lab work as akin to that of biologists and chemists. "Just as DNA examiners can point to repeating base pair matches to justify an identification, image examiners must be able to point to actual physical features on a face or body to justify their conclusions in court," an FBI publication from 2008 read.

A bank robbery trial 16 years ago was a watershed for such testimony. Prosecutors charged an ex-convict with robbing a string of banks across South Florida over two years. Richard Vorder Bruegge, an FBI image examiner, told jurors that the button-down plaid shirt found in the defendant's house was the exact shirt on the robber in black-and-white surveillance pictures. The examiner said he matched lines in the shirt patterns at eight points along the seams.

The prosecutor asked Vorder Bruegge what were "the odds in which two shirts would be randomly manufactured by the company, having all those eight points of identification lining up exactly the same?"

Only 1 in 650 billion shirts would randomly match so precisely, Vorder Bruegge said, "give or take a few billion."

An exhibit showing a 2001 photo comparison of a bank robber's shirt in surveillance video to a shirt seized from a defendant's home and modeled by FBI Lab examiner Richard Vorder Bruegge. The red arrows point to shirt features that allegedly match. (FBI Forensic Audio, Video and Image Analysis Unit, via Wilbert McKreith)

Prosecutors had presented jurors with days of circumstantial evidence against the ex-convict, Wilbert McKreith, before Vorder Bruegge took the stand. Witnesses had seen a burgundy-colored sedan similar to McKreith's Mercedes-Benz outside a majority of the robberies. And McKreith made cash purchases totaling about $10,000 during the period the robberies occurred, even though he had no steady income. (He said he borrowed money from his parents.)

But when the jury convicted McKrieth, who is serving a 92-year prison sentence, Vorder Bruegge's photo comparison and statistics were the only evidence that had directly connected the defendant to the crime spree.

The statistics were also preposterous, seven statisticians and independent forensic scientists told ProPublica.

The features Vorder Bruegge matched might be common in plaid shirts, making them of little value for identifying the garment, said Karen Kafadar, chair of the statistics department at the University of Virginia. No one has studied the alignment of lines on men's button-down shirts. There is no database of shirt features allowing Vorder Bruegge to calculate the probability of a random match, a statistic used to explain results from DNA typing.

Kafadar has worked in forensic science validation for the past two decades, contributing to a groundbreaking study of the FBI's bullet lead analysis. She said Vorder Bruegge's statements are brazen.

"Somehow they feel perfectly entitled to make outrageous statements," said Kafadar, who said the 1-in-650-billion claim "makes about as much sense as the statement two plus two equals five."

In this photo comparison exhibit, Vorder Bruegge placed white arrows pointing to lines he contended helped identify the defendant's shirt as the one worn by the robber in a December 2000 bank heist. (FBI Forensic Audio, Video and Image Analysis Unit, via Wilbert McKreith)

Research has bolstered some of the image unit's practices. Last year, a federal study determined that professional image examiners matched faces more accurately than untrained students — providing the first scientific basis for a photograph comparison field.

However, in the past six years, FBI examiners participated in preliminary tests on techniques for identifying faces and hands in pictures with skin features — freckles, folds and creases, moles and blemishes. In both, participants couldn't consistently mark the features to use in an analysis. They marked a certain number of creases or freckles on a face or hand the first time and came up with very different counts the next.

Those studies found alarming inconsistency. If examiners cannot mark the same features each time they use a technique, "then you can't rely on the result, I think that's what any statistician would say," said David Kaye, a Penn State University law professor and expert on DNA analysis. "It's not a reliable measure."

The FBI response to ProPublica said the image unit's own methods differ from those in the studies. But the unit's published descriptions of its practices show they are effectively the same as the ones tested by researchers.

Image examiners testified about conclusions based on these methods as recently as last year. The lab has not conducted, or has not published, similar research on its techniques for matching clothes or cars in pictures.

In 2014, an FBI face comparison contributed to a wrongful arrest in Colorado, detailed in an article by The Intercept. But image analysis has otherwise drawn little scrutiny.

Such deficiencies rarely matter in court. Few defense lawyers receive training in science or statistics, leaving them ill-suited to dispute expert witnesses. Examiners from Quantico seem "virtually unchallengeable" on the stand, said Lara Bazelon, a former federal public defender who is now a University of San Francisco law professor.

"I think everyone looking back has regrets about things that they've done as a lawyer," Bazelon said, "but one of mine certainly is accepting a lot of the science that I got in discovery as, 'Well, it came from the FBI Lab and it sounds really sophisticated, so it's probably true.'"

For the Nation's Crime Lab, a Reckoning

The FBI opened the laboratory in 1932, and for the next 60 years its forensic science was more revered than scrutinized.

Then, in August 1995, lawyers for a defendant on trial in the bombing of the World Trade Center called Frederic Whitehurst, a chemist on the bureau's explosives unit, to testify. Whitehurst told the court his lab colleagues had produced inaccurate reports in the case.

He had complained within the lab for years about unqualified explosives examiners and shoddy scientific practices. The FBI mostly dismissed the concerns and, Whitehurst said, reassigned him to a different unit as retaliation. So he went public — on the stand and to the press.

The Justice Department's Office of the Inspector General was already investigating Whitehurst's allegations. Its final report, released in 1997, confirmed the explosives unit had "significant instances of testimonial errors, substandard analytical work, and deficient practices" in several cases, including the World Trade Center and Oklahoma City bombings.

Officials at the bureau had overlooked the explosives unit's bad practices and didn't move urgently to fix them, Bill Esposito, then FBI deputy director, said at the time. "While the issues raised by the Inspector General concern only a small part of the total volume of work done annually in the lab, we recognize that even one problem is too many."

> **We found, however, significant instances of testimonial errors, substandard analytical work, and deficient practices.**
> ***U.S. Department of Justice, Office of the Inspector General's Special Report, 1997***

The lab already knew about a second problem.

As the explosives unit became a scandal, the Justice Department began reviewing the top FBI hair and fiber examiner's work on hundreds of cases.

The in-house review looked at examiner Michael P. Malone's lab work and sworn statements in more than 250 cases. It found Malone routinely misrepresented his results as valid and his error rate as less than 1 percent. Justice Department officials did not make the finding public, nor did it notify lawyers for the defendants in those cases, or scrutinize the rest of the hair unit, reporting by The Washington Post revealed in 2012.

Advances in DNA analysis technology were rattling many forensic science fields, revealing wrongful convictions won with other crime-lab evidence. Microscopic hair comparisons were particularly vulnerable to debunking because follicles contain genetic material. For decades, examiners told jurors that crime scene hairs came from defendants. DNA analysis later proved the hairs did not in dozens of cases. (The FBI replaced microscopic hair comparisons with DNA in 1999.)

Prompted by the Post's investigation, the Justice Department finished an expansive review of hair comparison testimony. Hair examiners matched defendants to follicles in 268 trials; all but 11 contained scientific error. They were more conservative in their written lab reports, about half of which included a misstatement. Like other forensic science reckonings, the public disclosure came years after the FBI stopped relying on the method.

Another unit at the FBI Lab had for decades matched bullets by their chemical compositions.

FBI chemists asserted the mix of elements in a round could determine whether its lead matched ammunition seized from defendant's cars and homes. In court, they said crime scene rounds were "indistinguishable" from the suspects' bullets, even suggesting they came from the same box. The bureau had no science to back its claims.

Facing court challenges, the FBI in 2002 asked the National Academies of Sciences, Engineering and Medicine to study the methods and value of bullet lead analysis.

The report by researchers in 2004 said the examiners' testimony went further than the chemical analysis allowed. "The available data do not support any statement that a crime bullet came from a particular box of ammunition," the academies' report said.

Further, one bullet could match anywhere from 12,000 to 35 million other bullets. FBI officials discontinued lead analysis a year later.

Also in 2004, fingerprint examiners wrongly matched a print from a train bombing in Spain to a lawyer and Muslim convert in Portland, Oregon. Agents arrested and detained the lawyer for more than two weeks, without criminal charges, before Spanish law enforcement disproved the FBI's conclusion.

Following each scandal, the bureau moved to shutter the discredited unit or correct the disputed method. It did not comprehensively search past casework for convictions based on the lab's inaccurate evidence, nor did it evaluate whether other units had the same bad practices — unproven techniques, fabricated error rates, misleading testimony.

"The FBI Lab is a fixer," Whitehurst said in an interview last year. Examiners have many incentives to find evidence that helps a conviction, he said.

In 2009, the National Academies of Sciences published a wide-ranging evaluation of the forensic sciences and their deficiencies. It recommended crime labs be moved out of the police and prosecuting agencies that have always run them. To date, Houston and Connecticut are the only jurisdictions that have made their crime labs independent of the police. The Justice Department never publicly considered separating Quantico from the FBI.

A 2016 report by former President Barack Obama's council of science and technology advisershighlighted the lack of validation in several pattern evidence fields. It also called on the FBI to dramatically increase spending on studies to prove its methods. U.S. Department of Justice officials rejected most of the advisers' conclusions. Federal law enforcement has doubled down on unproven forensic science.

In 2017, then-Attorney General Jeff Sessions closed the National Commission on Forensic Science, ending an effort to set standards for crime laboratory practices. The department also stopped its internal review of testimony from FBI pattern evidence units.

> **"The report makes broad, unsupported assertions regarding science and forensic science practice.**
>
> ***The FBI response to a 2016 report by a presidential advisory panel criticizing pattern evidence. Sept. 20, 2016.***

In a law review article last year, two high-ranking FBI Lab scientists dismissed validation concerns as uninformed. They wrote that, already, "every forensic discipline practiced in an accredited forensic laboratory must demonstrate that it is reliable, accurate, and fit for its intended use."

Quantico is, indeed, accredited. But the lab has never proven photo analysis is reliable. It has increasingly done the opposite.

Science and the Supreme Court

From its beginnings, photo comparison has been a craft and FBI image examiners more like tradespeople than scientists. Methods are taught through apprenticeships, with new examiners doing casework alongside lab veterans.

After Congress passed a law in 1968 requiring banks to have security equipment, most banks installed surveillance cameras. Meanwhile, Eastman Kodak sold the public millions of pocket-size cameras and amateur photographers took billions of exposures of life and, occasionally, of crimes.

Pictures flooded the bureau as evidence. The lab formed a team called the Special Photographic Unit to find information in images and manage the bureau's inventory of 35 mm cameras. No scientific background or advanced degrees were required.

The analysis was rarely straightforward, said Gerald Richards, who led the photo unit in the 1980s and early 1990s and is now retired. Photographs were fuzzy and poorly lit, especially those from bank cameras. Robbers often wore masks. When a criminal's face was obscured, they looked at the ears, shirts, pants and shoes.

Fingerprint examiners focus only on the swirls and deltas on human fingertips. Hair fiber examiners only analyzed hairs and fibers.

But image examiners created a tapestry of techniques that cross into photography, physics, clothes manufacturing, dermatology, auto body design, human aging and statistics. Still, the unit requires examiners to study photography and little else before working on criminal cases. There weren't even formal courses on photo comparison until 2005, court records show.

Judges long accepted examiners' testimony as expert opinion without much debate. Agents were experts because they worked at the FBI Lab.

Then, in June 1993, the Supreme Court transformed the law around scientific evidence. The court's ruling in Daubert v. Merrell Dow Pharmaceuticals Inc. said federal judges need to assess "whether the reasoning or methodology underlying the testimony is scientifically valid" before allowing it at trial.

Methods should be tested, the opinion said, and results should be based on reliable data that includes error rates. None of the pattern evidence fields met that standard. The Daubert decision posed an existential threat to many forensic sciences.

A month later, the image unit dodged a legal mine set by Daubert. The 9th U.S. Circuit Court of Appeals heard arguments on a bank robbery conviction in Southern California. A jury had convicted James D'Ambrosio based in large part on an FBI image analysis of denim jeans in surveillance pictures. A scientist for the defense testified that clothing comparison was unproven. The appellate court upheld D'Ambrosio's conviction without weighing the scientific merit.

Clothes comparison escaped without damage. But all of the unit's methods seemed vulnerable to challenge. The image unit was filled with former field agents and lab technicians, few of whom held advanced degrees. None had a background in research or academic publishing.

That changed in 1995 when the FBI hired Vorder Bruegge, the scientist whose testimony about plaid shirts would help prosecutors obtain a conviction in the string of Florida bank robberies.

> **"However, he said that there was insufficient scientific research done in the field of clothing comparison through photographs to state with any confidence that the jeans were the same.**
>
> ***In 1993, a defense expert disputed the scientific validity of an FBI bluejeans comparison, raising questions of whether the image analysis should be admissible. (9th U.S. Circuit Court of Appeals Unpublished Deposition 9 F.3d 1554)***

Before the FBI, Vorder Bruegge, then 31, had spent the previous four years working for a NASA contractor and vying for a spot in the space program. He earned a doctorate in geology from Brown University, where he had studied Venus' mountain belts and had written for science journals.

An Explosion and a "Barcode" for Bluejeans

In the Daubert opinion, the Supreme Court listed validation testing as the best way to meet the evidence standard. Those studies can be complicated to organize and are risky. What if the results disprove what examiners have said under oath for decades?

The next option was peer review, a term indicating the methods had been vetted by outside experts, then published in a science or academic journal. Vorder Bruegge was soon at work on an article that would put denim jean identification, the technique already challenged in court, into the scientific literature.

On April 1, 1996, a bomb had exploded in a lobby of The Spokesman-Review in Spokane, Washington. As police rushed to the newspaper's office, three men robbed a nearby bank and detonated another bomb on their way out.

A similar attack followed three months later at a Planned Parenthood clinic in Spokane and the same bank branch. The bombs caused building damage but no injuries. Surveillance video showed three men in ski masks, heavy jackets and denim jeans.

Agents arrested the members of a right-wing militia group and after searching their homes, seized 27 pairs of jeans. Back at the lab, Vorder Bruegge compared the pants against still images from bank video. He concluded that a pair of the defendants' jeans were identical to those worn by one of the attackers in the first robbery, and therefore must be the same pants.

Shortly after the militia members received life sentences in prison, Vorder Bruegge submitted an article to the Journal of Forensic Sciences titled, "Photographic Identification of Denim Trousers from Bank Surveillance Film" The article implied his method of jeans identification was a novel technique, though the photograph unit had long used it.

Vorder Bruegge said each light or dark patch of denim was a unique characteristic and, taken together, they formed a “barcode.”

SIDE SEAMS SERVE AS BARCODE FOR IDENTIFICATION. (p. 3)

FIG. 1—*Pucker or “ridge-and-valley” pattern along seam of blue jeans resembles a “barcode.”*

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Vorder Bruegge’s article “Photographic Identification of Denim Trousers from Bank Surveillance Film” asserted that “ridge-and-valley” patterns along seams of bluejeans are unique. (Journal of Forensic Sciences)

The seized pants were J.C. Penney “plain pocket” jeans, which the department store chain marketed as nearly indistinguishable from more expensive Levi’s 501 jeans.

Designs might be similar, but wear marks reveal to FBI examiners the jeans’ true identity, Vorder Bruegge argued.

At six points in the article, he acknowledged the method was not validated. That was of little concern, he wrote, because “the presence of such a large number of significant characteristics in a known pair of blue jeans precludes the possibility (or probability) of their having occurred by mere coincidence.”

In requests for responses from the FBI, ProPublica repeatedly sought an interview with Vorder Bruegge; the FBI declined.

With the article, Vorder Bruegge advanced the legal argument for image analysis further in three years than the FBI Lab had the previous three decades. It helped an array of methods meet the Daubert standard and become admissible scientific evidence in criminal trials.

Leading forensic scientists, statisticians and clothes manufacturing experts reviewed Vorder Bruegge’s article at ProPublica’s request. They said the FBI examiner’s central claims were misleading or wrong.

He wrote that manufacturing defects like dropped stitches, where a stitch is missing, are identifying features — the equivalent of a facial scar.

Not at all, said Alicia Carriquiry, director of the Center for Statistics and Applications in Forensic Evidence and an Iowa State University professor. Sewing machines can drop stitches in a consistent manner, embedding the same set of stitches in garment after garment.

“This could be that the same sewing machine in China is producing a drop stitch in the same position in every last pair of jeans until they change that needle,” Carriquiry said. Thousands of pairs of jeans would have the same feature.

The barcode pattern is unique because the stitching varies between pairs, Vorder Bruegge wrote.

But jean manufacturing has been standardized across the industry for a long time, said Charles Jebara, chief executive of Alpha Garment, which sells jeans under Nicole Miller and other labels. The number of stitches per inch along a seam is much the same from one factory floor to another. “They’re using the same kinds of machines, the same general processes to get that operation done,” Jebara said.

Denim in various pairs of jeans is so similar that the FBI’s hair and fiber unit long ago deemed it useless as evidence. “Because of the commonality of blue denim cotton fibers, we don’t even bother to compare them in the FBI Laboratory,” an examiner testified in a 1991 murder trial.

FBI FIBER EXAMINER TESTIFIES THAT DENIM FIBERS USELESS AS EVIDENCE. (p. 119)

A Because of the commonality of blue denim cotton fibers, we don't even bother to compare them in the FBI laboratory.

View the entire document with DocumentCloud

An FBI fiber examiner testified in a 1991 murder trial that denim fibers are useless as evidence. (U.S. District Court for the Northern District of Ohio, Western Division)

Suzanne Bell, head of the forensic science department at West Virginia University, read Vorder Bruegge’s article when it was first published. Its flaws mirror those of many fields: examiners making statements they cannot prove, Bell wrote in response to ProPublica’s questions.

“The problems usually arise in over-selling the value and implying probabilistic information when there really is none,” she wrote. “You can see that in the article.”

Jeans comparisons could help ongoing investigations, but they aren’t conclusive evidence. “It wouldn’t stand scrutiny today,” Bell wrote.

A Bank Robbery Case Puts Clothing Analysis on Trial

The FBI Lab put its new scientific literature to use in Florida.

In 2002, prosecutors charged Wilbert McKreith, an ex-convict and entrepreneur, with robbing eight banks along the Fort Lauderdale coastline. The evidence gathered against McKreith wasn’t overwhelming.

But agents had seized a plaid button-down shirt from McKreith’s house and sent it to the image unit at Quantico for analysis. Vorder Bruegge got the case.

In the lab, he put on McKreith’s shirt and stood in poses similar to the robber in surveillance pictures while another examiner took photographs. Vorder Bruegge compared pictures of himself to those of the robber, focused exclusively on how parts of the shirt lined up along the seams.

On many mass-produced shirts, the lines on one section don’t align with those of other sections, causing the patterns to clash where they’re stitched together. FBI image examiners routinely testified those clashing patterns were “individual characteristics” that can identify a garment.

In the case of U.S. v. McKreith, Vorder Bruegge took the old method one giant leap further by adding statistics. He concluded the defendant’s shirt matched the robber’s at eight different points, court records show. And then he calculated the probability that a random shirt — not McKreith’s — would match as precisely.

Measuring the pixelated bank photo, Vorder Bruegge decided the odds that one feature would match on a random plaid shirt were only 3 percent. If two features matched, the random match probability dropped to one-tenth of a percent.

For all eight features, the chance that a shirt other than McKreith’s would match was just 1 in 650 billion, the examiner decided.

Prosecutors used Vorder Bruegge's testimony in an effort to erase any doubt about McKreith's guilt. In the Fort Lauderdale federal courthouse, the FBI examiner cited his Journal of Forensic Sciences article on jeans comparison to establish his methods were valid.

John Howes, McKreith's defense attorney, asked the court to suppress the image analysis as unscientific. But he didn't see the article before they were in court, and he never read it.

The judge ruled Vorder Bruegge's testimony met the Daubert standard and was admissible. The decision enshrined the FBI unit's techniques and testimony as reliable scientific evidence.

Near the close of McKreith's trial, Roger Stefin, an assistant U.S. attorney, asked Vorder Bruegge what his analysis determined about McKreith's shirt and the robber's shirts in pictures from several banks.

"They're all the same shirt," he said.

Vorder Bruegge matched features on the robber's shoulder, where the shirt fabric was bunched and blurred, in a surveillance image of a November 2000 bank robbery. He'd previously written that precise measurements of clothes in pictures are often unreliable. (FBI Forensic Audio, Video and Image Analysis Unit, via Wilbert McKreith)

In fact, Vorder Bruegge's original analysis did not link McKreith's plaid button-down shirt in one of the earliest robberies, of a Commerce Bank branch in May 2000, according to the written lab report. The surveillance images were not detailed enough and "it was not possible to identify" the defendant's shirt "as the shirt worn by the robber to the exclusion of all other shirts."

Vorder Bruegge directly contradicted his report in court. He explained at length to jurors how he matched shirts in that case, with four large Commerce Bank photo exhibits.

The jury convicted McKreith of seven robberies. Now 60, he is held at a federal penitentiary in California's Central Valley, with 76 years remaining on his sentence. He's exhausted his appeals, most of which attempted to dispute the FBI Lab findings.

The statisticians who reviewed Vorder Bruegge's materials for ProPublica said the examiner's calculations cannot be correct. Vorder Bruegge's statistic — 1 in 650 billion — is simply too astronomical to be true, said Kaye, the Penn State professor. There isn't a database documenting features on plaid-shirt seams like there is for human DNA, making it impossible to determine the likelihood a different shirt would appear to match the robber's shirt.

Many problems in the examiner's testimony went unnoticed, or were simply unknown, during trial. For example, Vorder Bruegge undercut the precision of his calculations when he admitted having rounded down the shirt measurements used in his calculations because "it makes the math easier."

The jeans article, which Vorder Bruegge cited as proof his methods are accepted science, does not mention any of the techniques he used in the shirt comparison.

Further, Vorder Bruegge wrote in the article that measurements of objects in photographs are "less accurate when measuring curved objects such as a draped trouser leg," the article said. The photographed shirts in the McKreith case were curved around shoulders and arms.

> **"It would be one in thirty-five times one in thirty-five. But to simplify things and to be conservative, I prefer to use one in thirty. By saying one in thirty, that's — it's giving it a better chance of being the same, but it makes the math easier. Thirty times thirty is nine hundred.**
>
> *Vorder Bruegge's testimony in U.S. v. McKreith. (Transcript from U.S. District Court for the Southern District of Florida)*

On the stand, Vorder Bruegge didn't mention that his precise measurements might be inaccurate.

"It may be an honest belief," Kaye said, "though terribly flawed."

Five years after the trial, Vorder Bruegge described his methods in a presentation to the National Academies of Sciences, including clothes identification and random match probabilities.

Testing the Techniques, and Coming Up Short

Image examiners at the bureau have boasted they can figure out who's who in photographs even under the most difficult circumstances so long as they can see details on the skin. Scars, tattoos and chipped teeth make identifications straightforward.

Examiners contend they can do the same with only common skin marks: freckles, blemishes, wrinkles, creases on the lips.

"By using these traits, effectively the 'texture' of the face, examiners have been able to differentiate between identical twins in images," members of the unit wrote in an FBI publication.

The same principle has been applied to the back of suspects' hands. In some cases, most commonly sexual assaults, the assailant takes pictures of their criminal act and one of their hands stays in the frame. Investigators find the images on a computer hard drive and want to confirm the photographed hand belongs to their suspect.

Military investigators asked the FBI Lab for such an analysis in 2013, in a case involving a U.S. Air Force lawyer accused of raping a child. Christopher Iber, an examiner in the image unit, received the evidence and set about comparing hands.

At trial, Iber "testified that based on similar features between the two hands — such as knuckle creases, hand creases, and blemishes — in his opinion, the hands depicted in the two photographs were the same," an Air Force appellate decision states.

Iber did not respond to interview requests.

Read More

How a Dubious Forensic Science Spread Like a Virus
From his basement in upstate New York, Herbert MacDonell launched modern bloodstain-pattern analysis, persuading judge after judge of its reliability. Then he trained hundreds of others. But what if they're getting it wrong?

The military lawyer was convicted at court-martial; he tried to overturn the conviction, in part, by arguing Iber's work was not valid. But the defense didn't challenge the underlying science of hand comparison at trial, and the appeals court dismissed the argument.

Unbeknownst to the courts, the FBI Lab itself was challenging the science behind its skin mark comparisons, somewhat inadvertently.

Vorder Bruegge partnered with Patrick Flynn, a University of Notre Dame computer science professor, on a research project in 2011. They served together on a group writing standards for facial identification by law enforcement.

Facial recognition algorithms match photos primarily by measuring the relative distances between a face's landmarks — specific points on the eyes, nose, brow and so on. Flynn believes adding skin marks to the formulas can help their accuracy. The FBI Lab had already been using those features in image analysis, so Vorder Bruegge lent his experience.

Photos of identical twins were ideal for testing the idea, Flynn said, as their facial landmarks are exactly the same but their freckles and creases were believed to be different. The algorithm would try to locate skin marks, but he had graduate students mark them, too, just as examiners do.

An early finding disputed the FBI's contention that each identical twin had his or her own unique features. Researchers documented that twins share freckles much the way they share all other genetic traits.

The FBI's response to ProPublica said the unit's twin comparisons in casework "dating to the early 1990's demonstrate that these individuals can be easily distinguished from one another based on these patterns, when the marks are visible."

But the study continued, next examining how consistently the computer found skin marks compared with the human participants. The algorithm did badly, but the humans were completely unreliable. All the participants came up with different sets of freckles and blemishes. Moreover, participants were asked to locate skin features on the same photos twice, and they came up with different results each time.

The study had troubling implications for the FBI's image unit. If examiners mark different features to analyze each time they look at a picture, their entire technique is likely unreliable. Science demands consistent results.

It does not appear the bureau has undertaken a study on its examiners' performance, even as similar research results have continued to come in.

> **"... individual observers perceive facial marks differently over time and the annotations are inconsistent. ... different observers view facial marks differently, leading to inconsistency.**
>
> ***Article detailing the results of a study on the use of facial skin features to distinguish between identical twins. Vorder Bruegge was one of the co-authors. ("Analysis of Facial Marks to Distinguish Between Identical Twins", IEEE Transactions on Information Forensics and Security, Vol. 7, No. 5, October 2012)***

In 2012, the Defense Forensic Science Center, the U.S. military's crime laboratory, tested hand comparisons. Researchers intended to develop an algorithm that could identify people the way the FBI Lab does. They began with the first step in validation, confirming examiners could consistently locate skin features on the back of hands in pictures.

The results were unexpectedly poor. Professional examiners came up with differing sets of freckles and sunspots each time they reviewed the hand images, and they didn't even seem to use the same method as one another.

Most damning, the trained forensic scientists were no more reliable than students. The military researchers published their results in the Journal of Forensic Sciences in November 2015.

"It's another example of the familiar story," said Simon Cole, a University of California, Irvine, criminology professor and pattern evidence researcher. "Use in court first, validate second."

That did not dissuade the FBI Lab. A bureau image examiner testified on the results of a thumb comparison in a May 2017 child pornography trial.

But Vorder Bruegge had taken notice. Around the time of the trial he selected Derek Boyd, an anthropology graduate student at the University of Tennessee, for a summer internship at Quantico solely to conduct an in-house hand comparison study.

Vorder Bruegge took pictures of his own left hand, then marked its features as a participant in a study of hand comparison. (Image from poster board presented at the American Academy of Forensic Sciences in February 2018. Courtesy Derek Boyd.)

Three interns and three FBI examiners documented knuckle creases and other skin features on pictures Vorder Bruegge took of his own left hand. Boyd said he expected the results would bolster the hand comparison technique.

Instead, they debunked the method a second time. Examiners were no better than interns. All were inconsistent and imprecise.

"I was fascinated by how the human eye is still outperforming the algorithm," Boyd said in an interview. "Yet what we found here is the human eyes don't necessarily agree. That's alarming."

Vorder Bruegge and the other examiners had muted reactions when he delivered the study results, Boyd said. "There was just kind of a, 'OK, well, that's good to know,'" he said.

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The Washington Post

Local

Convicted defendants left uninformed of forensic flaws found by Justice Dept.

Correction: *Earlier versions of this story gave the wrong middle initial for former federal prosecutor Michael R. Bromwich.*

By Spencer S. Hsu
April 16, 2012

Justice Department officials have known for years that flawed forensic work might have led to the convictions of potentially innocent people, but prosecutors failed to notify defendants or their attorneys even in many cases they knew were troubled.

Officials started reviewing the cases in the 1990s after reports that sloppy work by examiners at the FBI lab was producing unreliable forensic evidence in court trials. Instead of releasing those findings, they made them available only to the prosecutors in the affected cases, according to documents and interviews with dozens of officials.

In addition, the Justice Department reviewed only a limited number of cases and focused on the work of one scientist at the FBI lab, despite warnings that problems were far more widespread and could affect potentially thousands of cases in federal, state and local courts.

As a result, hundreds of defendants nationwide remain in prison or on parole for crimes that might merit exoneration, a retrial or a retesting of evidence using DNA because FBI hair and fiber experts may have misidentified them as suspects.

In one Texas case, Benjamin Herbert Boyle was executed in 1997, more than a year after the Justice Department began its review. Boyle would not have been eligible for the death penalty without the FBI's flawed work, according to a prosecutor's memo.

The case of a Maryland man serving a life sentence for a 1981 double killing is another in which federal and local law enforcement officials knew of forensic problems but never told the defendant. Attorneys for the man, John Norman Huffington, say they learned of potentially exculpatory Justice Department findings from The Washington Post. They are seeking a new trial.

Justice Department officials said that they met their legal and constitutional obligations when they learned of specific errors, that they alerted prosecutors and were not required to inform defendants directly.

The review was performed by a task force created during an inspector general's investigation of misconduct at the FBI crime lab in the 1990s. The inquiry took nine years, ending in 2004, records show, but the findings were never made public.

In the discipline of hair and fiber analysis, only the work of FBI Special Agent Michael P. Malone was questioned. Even though Justice Department and FBI officials knew that the discipline had weaknesses and that the lab lacked protocols — and learned that examiners' "matches" were often wrong — they kept their reviews limited to Malone.

But two cases in D.C. Superior Court show the inadequacy of the government's response.

Santae A. Tribble, now 51, was convicted of killing a taxi driver in 1978, and Kirk L. Odom, now 49, was convicted of a sexual assault in 1981.

Key evidence at each of their trials came from separate FBI experts — not Malone — who swore that their scientific analysis proved with near certainty that Tribble's and Odom's hair was at the respective crime scenes.

But DNA testing this year on the hair and on other old evidence virtually eliminates Tribble as a suspect and completely clears Odom. Both men have completed their sentences and are on lifelong parole. They are now seeking exoneration in the courts in the hopes of getting on with their lives.

Neither case was part of the Justice Department task force's review.

A third D.C. case shows how the lack of Justice Department notification has forced people to stay in prison longer than they should have.

Donald E. Gates, 60, served 28 years for the rape and murder of a Georgetown University student based on Malone's testimony that his hair was found on the victim's body. He was exonerated by DNA testing in 2009. But for 12 years before that, prosecutors never told him about the inspector general's report about Malone, that Malone's work was key to his conviction or that Malone's findings were flawed, leaving him in prison the entire time.

After The Post contacted him about the forensic issues, U.S. Attorney Ronald C. Machen Jr. of the District said his office would try to review all convictions that used hair analysis.

Seeking to learn whether others shared Gates's fate, The Post worked with the nonprofit National Whistleblowers Center, which had obtained dozens of boxes of task force documents through a years-long Freedom of Information Act fight.

Task force documents identifying the scientific reviews of problem cases generally did not contain the names of the defendants. Piecing together case numbers and other bits of information from more than 10,000 pages of documents, The Post found more than 250 cases in which a scientific review was completed. Available records did not allow the identification of defendants in roughly 100 of those cases. Records of an unknown number of other questioned cases handled by federal prosecutors have yet to be released by the government.

The Post found that while many prosecutors made swift and full disclosures, many others did so incompletely, years late or not at all. The effort was stymied at times by lack of cooperation from some prosecutors and declining interest and resources as time went on.

Overall, calls to defense lawyers indicate and records documented that prosecutors disclosed the reviews' results to defendants in fewer than half of the 250-plus questioned cases.

Michael R. Bromwich, a former federal prosecutor and the inspector general who investigated the FBI lab, said in a statement that even if more defense lawyers were notified of the initial review, "that doesn't absolve the task force from ensuring that every single defense lawyer in one of these cases was notified."

He added: "It is deeply troubling that after going to so much time and trouble to identify problematic conduct by FBI forensic analysts the DOJ Task Force apparently failed to follow through and ensure that defense counsel were notified in every single case."

Justice Department spokeswoman Laura Sweeney said the federal review was an "exhaustive effort" and met legal requirements, and she referred questions about hair analysis to the FBI. The FBI said it would evaluate whether a nationwide review is needed.

"In cases where microscopic hair exams conducted by the FBI resulted in a conviction, the FBI is evaluating whether additional review is warranted," spokeswoman Ann Todd said in a statement. "The FBI has undertaken comprehensive reviews in the past, and will not hesitate to do so again if necessary."

Santae Tribble and Kirk Odom

John McCormick had just finished the night shift driving a taxi for Diamond Cab on July 26, 1978. McCormick, 63, reached the doorstep of his home in Southeast Washington about 3 a.m., when he was robbed and fatally shot by a man in a stocking mask, according to his widow, who caught a glimpse of the attack from inside the house.

Police soon focused on Santae Tribble as a suspect. A police informant said Tribble told her he was with his childhood friend, Cleveland Wright, when Wright shot McCormick.

After a three-day trial, jurors deliberated two hours before asking about a stocking found a block away at the end of an alley on 28th Street SE. It had been recovered by a police dog, and it contained a single hair that the FBI traced to Tribble. Forty minutes later, the jury found Tribble guilty of murder. He was sentenced in January 1980 to 20 years to life in prison.

Tribble, 17 at the time, his brother, his girlfriend and a houseguest all testified that they were together preparing to celebrate the guest's birthday the night McCormick was killed. All four said Tribble and his girlfriend were asleep between 2 and 4:30 a.m. in Seat Pleasant.

Tribble took the stand in his own defense, saying what he had said all along — that he had nothing to do with McCormick's killing.

The prosecution began its closing argument by citing the FBI's testimony about the hair from the stocking.

This January, after a year-long effort to have DNA evidence retested, Tribble's public defender succeeded and turned over the results from a private lab to prosecutors. None of the 13 hairs recovered from the stocking — including the one that the FBI said matched Tribble's — shared Tribble's or Wright's genetic profile, conclusively ruling them out as sources, according to mitochondrial DNA analyst Terry Melton of the private lab.

"The government's entire theory of prosecution — that Mr. Tribble and Mr. Wright acted together to kill Mr. McCormick — is demolished," wrote Sandra K. Levick, chief of special litigation for the D.C. Public Defender Service and the lawyer who represents Gates, Tribble and Odom. In a motion to D.C. Superior Court Judge Laura Cordero seeking Tribble's exoneration, Levick wrote: "He has waited thirty-three years for the truth to set him free. He should have to wait no longer."

In an interview, Tribble, who served 28 years in prison, said that whether the court grants his request or not, he sees it as a final chance to assert his innocence.

"Ms. Levick has been like an angel," Tribble added, ". . . and I thank God for DNA."

Details of the new round of hair testing illustrate how hair analysis is highly subjective. The FBI scientist who originally testified at Tribble's trial, Special Agent James A. Hilverda, said all the hairs he retrieved from the stocking were human head hairs, including the one suitable for comparison that he declared in court matched Tribble's "in all microscopic characteristics."

In August, Harold Deadman, a senior hair analyst with the D.C. police who spent 15 years with the FBI lab, forwarded the evidence to the private lab and reported that the 13 hairs he found included head and limb hairs. One exhibited Caucasian characteristics, Deadman added. Tribble is black.

But the private lab's DNA tests irrefutably showed that the 13 hairs came from three human sources, each of African origin, except for one — which came from a dog.

"Such is the true state of hair microscopy," Levick wrote. "Two FBI-trained analysts, James Hilverda and Harold Deadman, could not even distinguish human hairs from canine hairs."

Hilverda declined to comment. Deadman said his role was limited to describing characteristics of hairs he found.

Kirk Odom's case shares similarities with Tribble's. Odom was convicted of raping, sodomizing and robbing a 27-year-old woman before dawn in her Capitol Hill apartment in 1981.

The victim said she spoke with her assailant and observed him for up to two minutes in the "dim light" of street lamps through her windows before she was gagged, bound and blindfolded in an hour-long assault.

Police put together a composite sketch of the attacker, based on the victim's description. About five weeks after the assault, a police officer was talking to Odom about an unrelated matter. He thought Odom looked like the sketch. So he retrieved a two-year-old photograph of Odom, from when he was 16, and put it in a photo array for the victim. The victim picked the image out of the array that April and identified Odom at a lineup in May. She identified Odom again at his trial, telling jurors her assailant "had left her with an image of his face etched in her mind."

At trial, FBI Special Agent Myron T. Scholberg testified that a hair found on the victim's nightgown was "microscopically like" Odom's, meaning the samples were indistinguishable. Prosecutors explained that Scholberg had not been able to distinguish between hair samples only "eight or 10 times in the past 10 years, while performing thousands of analyses."

But on Jan. 18 of this year, Melton, of the same lab used in the Tribble case, Mitotyping Technologies of State College, Pa., reported its court-ordered DNA test results: The hair in the case could not have come from Odom.

On Feb. 27, a second laboratory selected by prosecutors, Bode Technology of Lorton, turned over the results of court-ordered nuclear DNA testing of stains left by the perpetrator on a pillowcase and robe.

Only one man left all four partial DNA profiles developed by the lab, and that man could not have been Odom.

The victim "was tragically mistaken in her identification of Mr. Odom as her assailant," Levick wrote in a motion filed March 14 seeking his exoneration. "One man committed these heinous crimes; that man was not Kirk L. Odom."

Scholberg, who retired in 1985 as head of hair and fiber analysis after 18 years at the FBI lab, said side-by-side hair comparison "was the best method we had at the time."

Odom, who was imprisoned for 20 years, had to register as a sex offender and remains on lifelong parole. He says court-ordered therapists still berate him for saying he is not guilty. Over the years, his conviction has kept him from possible jobs, he said.

"There was always the thought in the back of my mind . . . 'One day will my name be cleared?'" Odom said at his home in Southeast Washington, where he lives with his wife, Harriet, a medical counselor.

Federal prosecutors declined to comment on Tribble's and Odom's specific claims, citing pending litigation.

One government official noted that Odom served an additional 16 months after his release for an unrelated simple assault that violated his parole.

However, in a statement released after being contacted by The Post, Machen, the U.S. attorney in the District, acknowledged that DNA results “raise serious questions in my mind about these convictions.”

“If our comprehensive review shows that either man was wrongfully convicted, we will promptly join him in a motion to vacate his conviction, as we did with Donald Gates in 2009,” Machen said.

The trouble with hair analysis

Popularized in fiction by Sherlock Holmes, hair comparison became an established forensic science by the 1950s. Before modern-day DNA testing, hair analysis could, at its best, accurately narrow the pool of criminal suspects to a class or group or definitively rule out a person as a possible source.

But in practice, even before the “‘CSI’ effect” led jurors to expect scientific evidence at every trial, a claim of a hair match packed a powerful, dramatic punch in court. The testimony, usually by a respected scientist working at a respected federal agency, allowed prosecutors to boil down ambiguous cases for jurors to a single, incriminating piece of human evidence left at the scene.

Forensic experts typically assessed the varying characteristics of a hair to determine whether the defendant might be a source. Some factors were visible to the naked eye, such as the length of the hair, its color and whether it was straight, kinky or curly. Others were visible under a microscope, such as the size, type and distribution of pigmentation, the alignment of scales or the thickness of layers in a given hair, or its diameter at various points.

Other judgments could be made. Was the hair animal or human? From the scalp, limbs or pubic area? Of a discernible race? Dyed, bleached or otherwise treated? Cut, forcibly removed or shed naturally?

But there is no consensus among hair examiners about how many of these characteristics were needed to declare a match. So some agents relied on six or seven traits, while others needed 20 or 30. Hilverda, the FBI scientist in Tribble’s case, told jurors that he had performed “probably tens of thousands of examinations” and relied on “about 15 characteristics.”

Despite his testimony, Hilverda recorded in his lab notes that he had measured only three characteristics of the hair from the stocking — it was black, it was a human head hair, and it was from an African American. Similarly, Scholberg’s notes describe the nightgown hair in Odom’s case in the barest terms, as a black, human head hair fragment, like a sample taken from Odom.

Hilverda acknowledged that results could rule out a person or be inconclusive. However, he told jurors that a “match” reflected a high likelihood that two hairs came from the same person. Hilverda added, “Only on very rare occasions have I seen hairs of two individuals that show the same characteristics.”

In Tribble's case, federal prosecutor David Stanley went further as he summed up the evidence. "There is one chance, perhaps for all we know, in 10 million that it could [be] someone else's hair," he said in his closing arguments, sounding the final word for the government.

Stanley declined to comment.

Flaws known for decades

The Tribble and Odom cases demonstrate problems in hair analysis that have been known for nearly 40 years.

In 1974, researchers acknowledged that visual comparisons are so subjective that different analysts can reach different conclusions about the same hair. The FBI acknowledged in 1984 that such analysis cannot positively determine that a hair found at a crime scene belongs to one particular person.

In 1996, the Justice Department studied the nation's first 28 DNA exonerations and found that 20 percent of the cases involved hair comparison. That same year, the FBI lab stopped declaring matches based on visual comparisons alone and began requiring DNA testing as well.

Yet examples of FBI experts violating scientific standards and making exaggerated or erroneous claims emerged in 1997 at the heart of the FBI lab's worst modern scandal, when Bromwich's investigation found systematic problems involving 13 agents. The lab's lack of written protocols and examiners' weak scientific qualifications allowed bias to influence some of the nation's highest-profile criminal investigations, the inspector general said.

From 1996 through 2004, a Justice Department task force set out to review about 6,000 cases handled by the 13 discredited agents for any potential exculpatory information that should be disclosed to defendants. The task force identified more than 250 convictions in which the agents' work was determined to be either critical to the conviction or so problematic — for example, because a prosecutor refused to cooperate or records had been lost — that it completed a fresh scientific assessment of the agent's work. The task force was directed to notify prosecutors of the results.

The only real notice of what the task force found came in a 2003 Associated Press account in which unnamed government officials said they had turned over results to prosecutors and were aware that defendants had been notified in 100 to 150 cases. The officials left the impression that anybody whose case had been affected had been notified and that, in any case, no convictions had been overturned, the officials said.

But since 2003, in the District alone, two of six convictions identified by The Post in which forensic work was reassessed by the task force have been vacated. That includes Gates's case, but not those of Tribble and Odom, who are awaiting court action and were not part of the task force review.

The Gates exoneration also shows that prosecutors failed to turn over information uncovered by the task force.

In addition to Gates, the murder cases in Texas and Maryland and a third in Alaska reveal examples of shortcomings.

All three cases, in addition to the District cases, were handled by FBI agent Malone, whose cases made up more than 90 percent of scientific reviews found by The Post.

In Texas, the review of Benjamin Herbert Boyle's case got underway only after the defendant was executed, 16 months after the task force was formed, despite pledges to prioritize death penalty cases.

Boyle was executed six days after the Bromwich investigation publicly criticized Malone, the FBI agent who worked on his case, but the FBI had acknowledged two months earlier that it was investigating complaints about him.

The task force asked the Justice Department's capital-case review unit to look over its work, but the fact that it failed to prevent the execution was never publicized.

In Maryland, John Norman Huffington's attorneys say they were never notified of the findings of the review in his case, leaving them in a battle over the law's unsettled requirements for prosecutors to turn over potentially exculpatory evidence and over whether lawyers and courts can properly interpret scientific findings.

In Alaska, Newton P. Lambert's defenders have been left to seek DNA testing of remaining biological evidence, if any exists, while he serves a life sentence for a 1982 murder. Prosecutors for both Huffington and Lambert claim they disclosed findings at some point to other lawyers but failed to document doing so. In Lambert's case, The Post found that the purported notification went to a lawyer who had died.

Senior public defenders in both states say they received no such word, which they say would be highly unlikely if it in fact came.

Malone, 66, said he was simply using the best science available at the time. "We did the best we could with what we had," he said.

Even the harshest critics acknowledge that the Justice Department worked hard to identify potentially tainted convictions. Many of the cases identified by the task force involved serious crimes, and several defendants confessed or were guilty of related charges. Courts also have upheld several convictions even after agents' roles were discovered.

Flawed agents or a flawed system?

Because of the focus on Malone, many questionable cases were never reviewed.

But as in the Tribble and Odom cases, thousands of defendants nationwide have been implicated by other FBI agents, as well as state and local hair examiners, who relied on the same flawed techniques.

In 2002, the FBI found after it analyzed DNA in 80 selected hair cases that its agents had reported false matches more than 11 percent of the time. “I don’t believe forensic science truly understood the significance of microscopic hair comparison, and it wasn’t until [DNA] that we learned that 11 percent of the time, two hairs can be microscopically similar yet come from different people,” said Dwight E. Adams, who directed the FBI lab from 2002 to 2006.

Yet a Post review of the small fraction of cases in which an appeals court opinion describes FBI hair testimony shows that several FBI agents gave improper testimony, asserting the remote odds of a false match or invoking bogus statistics in the absence of data.

For example, in testimony in a Minnesota bank robbery case, also in 1978, Hilverda, the agent who worked on Tribble’s case, reiterated that he had been unable to distinguish among different people’s hair “only on a couple of occasions” out of more than 2,000 cases he had analyzed.

In a 1980 Indiana robbery case, an agent told jurors that he had failed to tell different people’s hair apart just once in 1,500 cases. After a slaying in Tennessee that year, another agent testified in a capital case that there was only one chance out of 4,500 or 5,000 that a hair came from someone other than the suspect.

“Those statements are chilling to read,” Bromwich said of the exaggerated FBI claims at trial.

Todd, the FBI spokeswoman, said bureau lab reports for more than 30 years have qualified their findings by saying that hair comparisons are not a means of absolute positive identification. She requested a list of cases in which agents departed from guidelines in court. The Post provided nine cases.

Todd declined to say whether the bureau considered taking steps to determine whether other agents intentionally or unintentionally misled jurors. “Only Michael Malone’s conduct was questioned in the area of hair comparisons,” Todd said. “The [inspector general] did not question the merits of microscopic hair comparisons as a scientific discipline.”

Experts say the difference between laboratory standards and examiners’ testimony in court can be important, especially if no one is reading or watching what agents say.

“It seemingly has never been routine for crime labs to do supervision based on trial testimony,” said University of Virginia School of Law professor Brandon L. Garrett. “You can have cautious standards, but if no one is supervising their implementation, it’s predictable that analysts may cross the line.”

‘Veil of secrecy’

A review of the task force documents, as well as Post interviews, found that the Justice Department struggled to balance its roles as a law enforcer defending convictions, a minister of justice protecting the innocent, and a patron and practitioner of forensic science.

By excluding defense lawyers from the process and leaving it to prosecutors to decide case by case what to disclose, authorities waded into a legal and ethical morass that left some prisoners locked away for years longer than necessary. By adopting a secret process that limited accountability, documents show, the task force left the scope and nature of scientific problems unreported, obscuring issues from further study and permitting similar breakdowns.

“The government has hidden behind the veil of secrecy to shield these abuses despite official assurances that justice would be done,” said David Colapinto, general counsel of the National Whistleblowers Center.

The American Bar Association and others have proposed stronger ethics rules for prosecutors to act on information that casts doubt on convictions; opening laboratory and other files to the defense; clearer reporting and evidence retention; greater involvement by scientists in setting rules for testimony at criminal trials; and more scientific training for lawyers and judges.

Other experts propose more oversight by standing state forensic-science commissions and funding for research into forensic techniques and experts for indigent defendants.

A common theme among reform-minded lawyers and experts is taking the oversight of the forensic labs away from police and prosecutors.

“It’s human to make mistakes,” said Steven D. Benjamin, president-elect of the National Association of Criminal Defense Lawyers. “It’s wrong not to learn from them.”

More specifically, the D.C. Public Defender Service, Benjamin’s group and others said justice would be served by retesting hair evidence in convictions nationwide from 1996 and earlier. “If microscopic hair analysis was a key piece of evidence in a conviction, and it was one of only a limited amount of evidence in a case, would it be worthwhile to retest that using mitochondrial DNA? I would say absolutely,” said Adams, the former FBI lab director.

The promised review by federal prosecutors of hair convictions in the District would not include cases before 1985, when FBI records were computerized, and would not disclose any defendant’s name. That approach would have missed Gates, Odom and Tribble, who were convicted earlier.

Representatives for Machen, the FBI and the Justice Department also declined to say why the review should be limited to D.C. cases. The Post found that 95 percent of the troubled cases identified by the task force were outside the District.

Avis E. Buchanan, director of the D.C. Public Defender Service, said her agency must be “a full participant” in the review, which it has sought for two years, and that it should extend nationwide. “Surely the District of Columbia is not the only place where such flawed evidence was used to convict the innocent,” she said.

Staff researcher Jennifer Jenkins and database editor Ted Mellnik contributed to this report.

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Local

FBI admits flaws in hair analysis over decades

By Spencer S. Hsu
April 18, 2015

The Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000.

Of 28 examiners with the FBI Laboratory's microscopic hair comparison unit, 26 overstated forensic matches in ways that favored prosecutors in more than 95 percent of the 268 trials reviewed so far, according to the National Association of Criminal Defense Lawyers (NACDL) and the Innocence Project, which are assisting the government with the country's largest post-conviction review of questioned forensic evidence.

The cases include those of 32 defendants sentenced to death. Of those, 14 have been executed or died in prison, the groups said under an agreement with the government to release results after the review of the first 200 convictions.

The FBI errors alone do not mean there was not other evidence of a convict's guilt. Defendants and federal and state prosecutors in 46 states and the District are being notified to determine whether there are grounds for appeals. Four defendants were previously exonerated.

The admissions mark a watershed in one of the country's largest forensic scandals, highlighting the failure of the nation's courts for decades to keep bogus scientific information from juries, legal analysts said. The question now, they said, is how state authorities and the courts will respond to findings that confirm long-suspected problems with subjective, pattern-based forensic techniques — like hair and bite-mark comparisons — that have contributed to wrongful convictions in more than one-quarter of 329 DNA-exoneration cases since 1989.

In a statement, the FBI and Justice Department vowed to continue to devote resources to address all cases and said they "are committed to ensuring that affected defendants are notified of past errors and that justice is done in every instance. The Department and the FBI are also committed to ensuring the accuracy of future hair analysis testimony, as well as the application of all disciplines of forensic science."

Peter Neufeld, co-founder of the Innocence Project, commended the FBI and department for the collaboration but said, "The FBI's three-decade use of microscopic hair analysis to incriminate defendants was a complete disaster."

“We need an exhaustive investigation that looks at how the FBI, state governments that relied on examiners trained by the FBI and the courts allowed this to happen and why it wasn’t stopped much sooner,” Neufeld said.

Norman L. Reimer, the NACDL’s executive director, said, “Hopefully, this project establishes a precedent so that in future situations it will not take years to remediate the injustice.”

While unnamed federal officials previously acknowledged widespread problems, the FBI until now has withheld comment because findings might not be representative.

Sen. Richard Blumenthal (D-Conn.), a former prosecutor, called on the FBI and Justice Department to notify defendants in all 2,500 targeted cases involving an FBI hair match about the problem even if their case has not been completed, and to redouble efforts in the three-year-old review to retrieve information on each case.

“These findings are appalling and chilling in their indictment of our criminal justice system, not only for potentially innocent defendants who have been wrongly imprisoned and even executed, but for prosecutors who have relied on fabricated and false evidence despite their intentions to faithfully enforce the law,” Blumenthal said.

Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa) and the panel’s ranking Democrat, Patrick J. Leahy (Vt.), urged the bureau to conduct “a root-cause analysis” to prevent future breakdowns.

“It is critical that the Bureau identify and address the systemic factors that allowed this far-reaching problem to occur and continue for more than a decade,” the lawmakers wrote FBI Director James B. Comey on March 27, as findings were being finalized.

The FBI is waiting to complete all reviews to assess causes but has acknowledged that hair examiners until 2012 lacked written standards defining scientifically appropriate and erroneous ways to explain results in court. The bureau expects this year to complete similar standards for testimony and lab reports for 19 forensic disciplines.

Federal authorities launched the investigation in 2012 after The Washington Post reported that flawed forensic hair matches might have led to the convictions of hundreds of potentially innocent people since at least the 1970s, typically for murder, rape and other violent crimes nationwide.

The review confirmed that FBI experts systematically testified to the near-certainty of “matches” of crime-scene hairs to defendants, backing their claims by citing incomplete or misleading statistics drawn from their case work.

In reality, there is no accepted research on how often hair from different people may appear the same. Since 2000, the lab has used visual hair comparison to rule out someone as a possible source of hair or in combination with more accurate DNA testing.

Warnings about the problem have been mounting. In 2002, the FBI reported that its own DNA testing found that examiners reported false hair matches more than 11 percent of the time. In the District, the only jurisdiction where defenders and prosecutors have re-investigated all FBI hair convictions, three of seven defendants whose trials included flawed FBI testimony have been exonerated through DNA testing since 2009, and courts have exonerated two more men. All five served 20 to 30 years in prison for rape or murder.

University of Virginia law professor Brandon L. Garrett said the results reveal a "mass disaster" inside the criminal justice system, one that it has been unable to self-correct because courts rely on outdated precedents admitting scientifically invalid testimony at trial and, under the legal doctrine of finality, make it difficult for convicts to challenge old evidence.

"The tools don't exist to handle systematic errors in our criminal justice system," Garrett said. "The FBI deserves every recognition for doing something really remarkable here. The problem is there may be few judges, prosecutors or defense lawyers who are able or willing to do anything about it."

Federal authorities are offering new DNA testing in cases with errors, if sought by a judge or prosecutor, and agreeing to drop procedural objections to appeals in federal cases.

However, biological evidence in the cases often is lost or unavailable. Among states, only California and Texas specifically allow appeals when experts recant or scientific advances undermine forensic evidence at trial.

Defense attorneys say scientifically invalid forensic testimony should be considered as violations of due process, as courts have held with false or misleading testimony.

The FBI searched more than 21,000 federal and state requests to its hair comparison unit from 1972 through 1999, identifying for review roughly 2,500 cases where examiners declared hair matches.

Reviews of 342 defendants' convictions were completed as of early March, the NACDL and Innocence Project reported. In addition to the 268 trials in which FBI hair evidence was used against defendants, the review found cases in which defendants pleaded guilty, FBI examiners did not testify, did not assert a match or gave exculpatory testimony.

When such cases are included, by the FBI's count examiners made statements exceeding the limits of science in about 90 percent of testimonies, including 34 death-penalty cases.

The findings likely scratch the surface. The FBI said as of mid-April that reviews of about 350 trial testimonies and 900 lab reports are nearly complete, with about 1,200 cases remaining.

The bureau said it is difficult to check cases before 1985, when files were computerized. It has been unable to review 700 cases because police or prosecutors did not respond to requests for information.

Also, the same FBI examiners whose work is under review taught 500 to 1,000 state and local crime lab analysts to testify in the same ways.

Texas, New York and North Carolina authorities are reviewing their hair examiner cases, with ad hoc efforts underway in about 15 other states.

Comments

Spencer S. Hsu

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Local

Forensic techniques are subject to human bias, lack standards, panel found

By Spencer S. Hsu
April 17, 2012

In Hollywood, the moment the good guys trace a hair, a bullet fragment or a fingerprint, it's game over. The bad guy is locked up.

But the glamorized portrait is not so simple in real life.

Far from infallible, expert comparisons of hair, handwriting, marks made by firearms on bullets, and patterns such as bite marks and shoe and tire prints are in some ways unscientific and subject to human bias, a National Academy of Sciences panel chartered by Congress found. Other techniques, such as in bullet-lead analysis and arson investigation, survived for decades despite poorly regulated practices and a lack of scientific method.

Even fingerprint identification is partly a subjective exercise that lacks research into the role of unconscious bias or even its error rate, the panel's 328-page report said.

"The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure," the panel concluded in 2009.

Now, Congress and the Obama administration are trying to regulate forensic science to help establish standards. Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) and Commerce, Science and Transportation Committee Chairman John D. Rockefeller IV (D-W.Va.) are weighing legislation that could subject techniques to greater scientific scrutiny and help establish their ranges of accuracy.

A Leahy bill would create a new office of forensic science in the Justice Department. Rockefeller is preparing legislation to expand the role of the National Science Foundation and the National Institute of Standards and Technology in setting scientific standards and research goals.

The Obama administration is also looking to "strengthen the linkage between cutting-edge science . . . and the forensic tests used by law enforcement," said Rick Weiss, spokesman for the White House Office of Science and Technology Policy.

Police and law enforcement agencies have rebuffed recommendations to remove crime labs from their control.

Since 2002, failures have been reported at about 30 federal, state and local crime labs serving the FBI, the Army and eight of the nation's 20 largest cities.

Advances in DNA testing are exposing errors at unexpected rates. In November, researchers with the Urban Institute reported that new DNA testing appeared to clear convicted defendants in 16 percent of Virginia criminal convictions between 1973 and 1988 in which evidence was available for retesting.

A 2009 study of post-conviction DNA exonerations — now up to 289 nationwide — found invalid testimony in more than half the cases.

“There are just too many related problems for this to be dealt with ad hoc,” said Brandon L. Garrett, a professor at the University of Virginia School of Law.

More DNA testing alone is not the answer, experts say. Biological evidence historically is collected in fewer than 20 percent of criminal cases. Other questioned forensic techniques are used far more often, with mistakes harming defendants and crime victims whose true assailants remain at large.

The National Academy of Sciences report cited the lack of effective standards for examiners, laboratories and court testimony. It also criticized Justice Department agencies for a dearth of research into problems and for being “too wedded” to the status quo to be trusted to lead reforms.

“This is our generation’s sole opportunity” to get arguments out of the adversarial system and resolved through science, said Thomas L. Bohan, who was president of the American Academy of Forensic Sciences in 2010. “It’s a shame they couldn’t have done a good job 10 or 20 years ago.”

Research aids process

Arson investigation is an example of how research has dramatically improved practices.

Since 1990, the number of U.S. structure fires attributed to arson has dropped by half. One reason is that scientific test burnings have disproved the notion that some burn marks could be caused only by liquid accelerants.

Meanwhile, scientific doubts have festered for decades with fingerprint examination. While fingerprint analysis is one of the most valuable and frequently applied investigative tools, its accuracy has not been scientifically defined.

FBI examiners claimed until recently that they can match fingerprints to the exclusion of any other person in the world with 100 percent certainty using a method with an error rate essentially of zero. The academy report found that assertion was “not scientifically plausible” and had chilled research into error rates.

In 1999, a Justice Department official, Richard Rau, told a federal court that the department delayed such a study because of the legal ramifications. As recently as last year, Pennsylvania State University researcher Cedric Neumann was denied a department grant to determine potential fingerprint error rates using closed cases.

Neumann declined to comment for this article.

A person familiar with the episode blamed a polarized climate in the adversarial legal system, saying, “Few agencies in the forensic-science community want to be the first ones associated with an error rate.” The person spoke on the condition of anonymity to discuss sensitive federal research funding decisions.

Meanwhile, errors occur. In 2004, DNA for the first time exonerated a person convicted with a fingerprint match and, separately, the FBI made its first publicly acknowledged fingerprint misidentification. Brandon Mayfield, a Portland, Ore., lawyer, mistakenly was arrested in connection with the terrorist train bombings in Madrid that killed 191 people. The FBI apologized.

Since then, the Justice Department has begun research to try to quantify how complete a fingerprint must be to properly declare a match; how different conditions may affect the reliability of examinations; whether computers can do such work; and how to present forensic testimony about probabilities to judges and juries. The FBI has also required “blind verification” of results by agents unfamiliar with initial examinations.

Measuring accuracy

The bureau said that skilled analysts are extraordinarily accurate, at least when they know they are being tested. An FBI study with Noblis Corp. last year found that when 169 examiners compared thousands of fingerprints and decided there was enough information to declare a match or not, they were correct 99.8 percent of the time.

Still, the Mayfield case highlighted the need for research into real-world conditions. A 2006 study by a London-based scientist, Itiel E. Dror, asked experts to analyze fingerprints that, unbeknownst to them, they had analyzed earlier in their careers. This time, however, examiners were given biasing statements, such as that a suspect had confessed or that a suspect was locked up at the time of the offense. In 16.6 percent of cases, examiners reversed earlier judgments.

Crime lab directors and prosecutors welcome calls for more money for research and to improve examiners and facilities. But with budgets tight at all levels, Washington has few other tools to prompt 350 state and local labs across the country to improve.

Because techniques have not been scientifically proved does not mean they do not work, defenders say, and mistakes can be handled traditionally through case-by-case appeals.

“In the real life of the criminal justice system, we need more resources for those who are on the front lines,” said Scott D. Burns, executive director of the National District Attorneys Association. Noting that prosecutors handle 20 million non-traffic cases a year, Burns said, “The sky isn’t falling, and we usually get it right.”

Pete M. Marone, director of the Virginia Department of Forensic Science and chairman of the Consortium of Forensic Science Organizations, urged Congress not to “reinvent the wheel” by abandoning all existing accreditation standards or groups such as the one he represents.

“Don’t judge forensic science today based on errors from 30 years ago,” Marone said. “What we need is someone setting a research agenda and direction. . . . We need leadership.”

LDRC Libel Defense Resource Center

BULLETIN

TEN YEARS OF "INDEPENDENT APPELLATE REVIEW" IN DEFAMATION CASES FROM *BOSE* TO *CONNAUGHTON* TO THE PRESENT

1994 Issue No. 2
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TABLE OF CONTENTS

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY OF KEY FINDINGS

1. LDRC systematically examined the results of appeals from final plenary judgments in media and non-media defamation (and related) cases during the ten-year period commencing immediately after *Bose v. Consumers Union* (1984).

2. A total of 112 decided appeals were identified (in 111 cases), 92 of which were taken by defendants and 20 of which were taken by plaintiffs. There were 30 federal and 82 state appeals; 72 of the appeals were decided prior to *Harte-Hanks v. Connaughton* (1989) and 40 after *Connaughton*.

3. Overall, more than seven out of ten appeals by defendants (71.7%) were successful in securing either complete or partial "disturbance" of the initial judgment: 38 of 92 judgments (41.3%) were reversed outright; 13 (14.1%) were reversed although remanded for new trial; 6 (6.5%) were reversed as to punitive damages but affirmed as to the compensatory award; 2 (2.2%) were remanded as to the punitive award but affirmed as to the compensatory award; and 7 (7.6%) were affirmed but with remittiturs (see Table 1).

4. In contrast, plaintiffs achieved complete affirmances of the judgments they had obtained in less than three out of ten (28.3%) of defendants' appeals overall (see Table 1).

5. The major focus of LDRC's study was on application of the doctrine of "independent appellate review." LDRC found that defendants fared far better in the 54 cases in which independent appellate review was applied than in the 38 cases in which it was not applied. For example, the rate of outright reversals in favor of defendants was more than double when independent appellate review was applied -- 53.7% versus 23.7%. The comparative rate of outright affirmances favoring plaintiffs was also substantially lower when independent appellate review was applied -- 22.2% versus 36.8%. That independent appellate review also promotes judicial economy, by permitting appellate courts to reverse and simultaneously dispose of cases, is evident in the markedly higher rate of remands when independent appellate review is not applied (26.3% versus 5.6%) (see Table 2).

6. When independent appellate review was applied to the issue of actual malice, appellate courts reversed judgments on that issue in 66.7% of the cases studied. In cases that independently reviewed the issue of falsity, appellate courts reversed the trial court judgment on that issue in 83.3% of the cases studied, compared with a reversal rate of only 8.3% in cases in which falsity was reviewed on a "clearly erroneous" standard. In cases independently reviewing the issue of defamatory meaning, the reversal rate was 75%, compared with a 0% reversal rate when a "clearly erroneous" standard of review was applied (Table 6).

7. Judgments obtained by public figure plaintiffs were reversed outright nearly three times as frequently as judgments obtained by private figure plaintiffs -- 57.7% versus 20.0% (Table 5A). The total rate of disturbed judgments varied less significantly, with a 75% disturbance rate for public figure plaintiffs and a 67.5% disturbance rate for private figure plaintiffs. This convergence is largely the result of split decisions in which independent appellate review was applied only to the issue of actual malice regarding punitive damages and not to issues bearing upon compensatory damages.

8. Appellate results were somewhat more favorable in federal than in state courts. In federal cases, defendants obtained outright reversals in 47.6% of appeals, as opposed to a 39.4% outright reversal rate in state cases. The overall percentage of awards disturbed was also higher in federal than state court -- 77.2% versus 70.4% (see Table 1).

9. The effect of the two major Supreme Court decisions in the period studied is unclear. Although *Bose* has generally been hailed as a decision distinctly favorable to defendants while *Connaughton* has been viewed as a neutral decision at best, LDRC found that defendants suffered a higher rate of complete affirmances in the interval between *Bose* and *Connaughton* than after *Connaughton* -- 33.3% versus 25.4% (see Table 1). Yet defendants have been able to secure a somewhat higher percentage of outright reversals in the post-*Connaughton* period -- 45.5% versus 39.0% of appeals.

10. If the focus is shifted to plaintiffs' appeals the results are strikingly different. Sixty-five percent of judgments favoring defendants were completely affirmed on appeal, with plaintiffs achieving complete reversals in only 20% of their appeals outright, and in half of these instances, the reversals were themselves overturned at a later stage (Table 3). In the post-*Connaughton* period a higher percentage of defendants' judgments were completely affirmed (71.4% versus 61.5%) and a lower percentage were completely reversed (14.3% versus 23.1%) (Table 3). Plaintiff status had little effect on appellate result in plaintiffs' appeals, with an identical reversal rate (20%) and similar affirmance rates (66.7% versus 60%) for public figures as contrasted with private figures (Table 5B). However, the situs of the appeal did appear to have an effect, with 77.8% of judgments for defendants affirmed in federal courts versus an affirmance rate in state court of only 54.5%.

II. BACKGROUND

A. The Nature of Appellate Review

A variety of rules and standards govern appellate review of civil actions, depending upon the jurisdiction and the nature and procedural status of the judgment from which the appeal is taken. In general, following a complete trial in federal and most state courts, the normal standard of review of factual determinations is one of "clear error."[1] Even under this traditional standard, defining the precise role of the appellate court is hardly free from difficulty. Nonetheless, what does seem clear is that the "clearly erroneous" standard envisions a quite narrow scope of review and establishes a presumption of correctness in the factual findings of the trial court or jury. This presumption is said to be justified by several considerations, including the assumedly greater fact-finding capacity of the trial process, the factfinder's opportunity to immerse itself in the record, the ability to view the demeanor of live witnesses, and the overarching institutional necessity to achieve an efficient division of labor as between trial and appellate courts by avoiding a duplicative retrying of cases at the appellate level.

As a result of all of these considerations, the normal standard of appellate review under the clearly erroneous standard generally precludes the appellate court from, *inter alia*, determining the weight or credibility of the evidence or from independently assessing the inferences drawn by the trier of fact. Indeed, clearly erroneous review actually requires affirmance of any judgment unless the reviewing court finds either a material error of law[2] or unless the reviewing court is convinced that the judgment is plainly wrong and without factual evidence to support it. When the trial is by a jury rather than a judge, even greater appellate deference is normally accorded to the jury's findings, often due to constitutional provisions assuring the right to trial by jury which expressly limit the power of appellate courts to review factual findings. In such cases, deference is given to all reasonable jury findings and all legitimate inferences that could have been drawn by the jury.

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[1]The standard of appellate review from a non-plenary judgment is quite different, however. Thus, an appeal from a summary judgment is generally considered to raise a question of law which the appellate court will decide *de novo*. *See infra*, Sec. V (application of independent appellate review in the summary judgment context).

[2]Generally, an appellate court's review of questions of law as opposed to fact is said to be *"de novo"* -- i.e., an independent determination of the legal issues unrestrained by the prior determination of the trial court. The appellate court is not only considered to be in at least as good a position as the trial court to decide such questions but is by definition the assigned institutional prerogative of the appellate court authoritatively to make such legal determinations. "Mixed" questions of fact and law are also generally considered subject to *de novo* review, although distinctions between "pure" and "mixed" questions are themselves hardly easy to draw.

B. The Doctrine of "Independent Appellate Review"

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court's landmark libel decision, the Court not only established a new liability standard under the First Amendment, but also mandated application of a special and very different standard of appellate review in order to ensure that First Amendment rights had not been infringed by the entry of a judgment adverse to a libel defendant. The special mechanism for a more thorough and aggressive review on appeal mandated by *Sullivan*, which had previously been recognized in other First Amendment contexts, is generally known as "independent appellate review."

Although the *Sullivan* doctrine had been applied for nearly twenty years, in *Bose Corporation v. Consumers Union,* 466 U.S. 485 (1984), a libel plaintiff launched a major challenge to independent appellate review. Bose Corporation argued, in a federal case tried before a judge rather than a jury, that the First Circuit Court of Appeals' use of independent review to reverse the libel judgment against Consumers Union violated Rule 52(a) of the Federal Rules of Civil Procedure, which provides that findings of fact by a court shall not be set aside unless "clearly erroneous." The Supreme Court in *Bose* rejected this argument and strongly reaffirmed the principle of independent appellate review in libel actions as an indispensable aspect of protection for free expression under the First Amendment. The *Bose* Court held that "the clearly erroneous standard of Rule 52(a) ... does not prescribe the standard of review ... in a case governed by *New York Times.*" 466 U.S. at 514. Instead, the Court held in *Bose* that "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review," *id.* at 508 n.27, and that appellate courts must "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment." *Id.* at 511.

C. Understanding Independent Appellate Review

Despite the strength of both the Supreme Court's language and its actions in *Sullivan* and *Bose*, lower courts reached varying conclusions as to the precise applicability, depth, and breadth of the doctrine of independent appellate review.

For example, courts divided as to the applicability of independent appellate review to appeals *by plaintiffs* from final judgments for defendants. Some courts have explicitly treated independent appellate review as requiring heightened scrutiny of plaintiffs' as well as defendants' appeals.[3] Others rejected this approach, reasoning that although the Constitution imposes limits on recovery for defamation when the speech involves the First Amendment, it does not guarantee

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[3]*See, e.g., Bartimo v. Horseman's Benevolent and Protection Ass'n,* 771 F.2d 894 (5th Cir. 1985).

libel plaintiffs the right to recover for reputational damages.[4]

Courts also disagreed as to the *depth* of the review. The *en banc* opinion of the D.C. Circuit in *Tavoulareas v. Piro* summarized the two extreme positions as follows:

> Under one view *Bose*'s mandate of de novo review means precisely that, with no deference at all to be accorded any jury finding germane to actual malice. Under the contrary view, Bose does not alter the traditional rules governing the review of jury verdicts and thus judicial deference is constitutionally mandated to presumed jury findings of underlying facts, evaluations of credibility, and the drawing of inferences.[5]

In *Harte-Hanks Communications v. Connaughton*, 842 F.2d 825 (6th Cir. 1988), a 2 to 1 majority of a panel of the Sixth Circuit held, in affirming a libel damage award based on a jury verdict, that the standard of independent review does *not* displace the clearly erroneous standard of Rule 52(a) with regard to "preliminary, operative or subsidiary factual determinations," 842 F.2d at 842. Indeed, the *Connaughton* majority went so far as to suggest that to review such findings *de novo* would deny a libel plaintiff its Seventh Amendment right to a jury trial. *Id.* at 842 n.10.

Although the Supreme Court affirmed the libel judgment, it rejected the reasoning of the Sixth Circuit. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989). The Sixth Circuit had identified "11 subsidiary facts that the jury 'could have' found," first concluding that these findings would not have been clearly erroneous and then reviewing whether cumulatively they provided clear and convincing evidence of actual malice. Concluding that the case should have been decided on "less speculative grounds," the Supreme Court identified three disputed facts the jury "*must* have" found, all of which revolved on credibility determinations, to which the Court afforded deference. Considering those findings alongside the undisputed evidence, the Court found clear and convincing evidence of actual malice. The Court failed to address the precise reach of independent appellate review into subsidiary facts, leaving lower courts to continue to ponder how deeply to apply independent review under the mandate of *Sullivan* and *Bose*.

Finally, courts split over the *breadth* of issues subject to independent appellate review. In both *Bose* and *Connaughton*, the question of actual malice was central to the disposition of the appeals. Thus neither case required the Court to apply heightened scrutiny to other issues presented in defamation appeals. Since *Bose*, however, some lower appellate courts have applied independent appellate review to other issues that arguably also implicate First Amendment concerns, such as falsity, negligence, and identification. *See infra*, Section V.

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[4]*See e.g.*, *Brown v. K.N.D. Corp.*, 205 Conn. 8, 529 A.2d 1292 (Conn. 1987).

[5]817 F.2d 762 (D.C. Cir. 1987).

In sum, *Bose* and *Connaughton*, although generally mandating continued application of the doctrine of independent appellate review, have -- for better or worse -- left determination of the precise bounds of independent appellate review to lower appellate courts. Because of such remaining uncertainties, LDRC has undertaken to update its prior study of this important topic.

III. THE NEW LDRC APPELLATE REVIEW STUDY

A. LDRC's Prior Appellate Review Study

In 1983, on the eve of the Supreme Court's consideration of *Bose*, LDRC published its first study of independent appellate review, examining all state and federal appeals from *Sullivan* to that date in which the standard of independent review had been applied in libel actions. *See LDRC Bulletin* No. 7, at 1-47 (July 15, 1983). The initial LDRC appellate review study included a total of 60 federal and state court appeals (24 federal cases; 36 state). Eleven of the 12 federal circuits and 22 states were represented. The study reported that the *Sullivan* independent review standard was almost universally followed and applied in the cases identified. In LDRC's view, of all of the state and federal courts that had considered the issue prior to *Bose*, only two courts -- the Ninth and Tenth Circuits -- had failed to vigorously apply the concept of independent review pursuant to the constitutional mandate of *Sullivan*. Notably, it was those seemingly discredited Ninth Circuit cases upon which the Sixth Circuit in *Connaughton* later centrally relied. After LDRC's first study, the Supreme Court's resounding reaffirmation of independent appellate review in *Bose* largely eliminated any question as to whether independent appellate review of constitutional libel actions should be undertaken. As previously noted, however, the Court's subsequent decision in *Connaughton* left many questions unresolved regarding the applicability, depth, and breadth of independent appellate review.

B. The Current LDRC Study

This second LDRC appellate review study is divided temporally into two periods -- the first documenting decisions published during the interval between the Supreme Court decisions in *Bose* (April 30, 1984) and *Connaughton* (June 22, 1989), and the second reporting on decisions handed down following *Connaughton* through January 1994. In each period, federal and state court appeals are presented separately. Cases included in the new LDRC study were obtained through comprehensive searches using both the *Media Law Reporter* and computer databases. For the initial period, 72 cases were identified as relevant (21 federal, 51 state), and an additional 40 were obtained for the second period (9 federal, 31 state). Ten of the 12 federal circuits and 22 states are represented in the initial period and 7 circuits and 17 states are represented in the post-*Connaughton* period.

All cases included in the new LDRC study are presented in Section VII. Cases in the *Bose* to *Connaughton* period appear on pages A1-A26, first with federal cases listed numerically by circuit, followed by state cases listed alphabetically by state. Cases in the period from

Connaughton through January 1994 appear on pages B1-B16. The case list includes the full citation, the status of the parties as determined by the appellate court, the nature of the judgment appealed from, the result of the appeal, whether -- and to what issues -- independent appellate review was or was explicitly not applied, and a brief summary of other key legal issues addressed on the appeal. An alphabetical index of all cases in the new study appears at the back of the Bulletin, starting on page C1 and including the name of the firm and lead counsel in each case and indicating whether the appellate brief is currently available through LDRC's brief bank.

Empirical results of the study are presented in Section IV, Tables 1-6. A narrative discussion of certain key issues and trends in independent appellate review, beyond the bare statistics, appears in Section V.

IV. CHARTING TEN YEARS OF INDEPENDENT APPELLATE REVIEW

In attempting to draw conclusions from the more than one hundred cases studied, LDRC's findings have been empiricized in the six tables presented below.

Table 1 reports the results of all defendants' appeals, divided temporally by the Supreme Court decision in *Connaughton* and by situs into federal and state courts, along with a combined presentation covering the full ten-year study period. In this table, as well as in Tables 2-5, a substantial number of the cases studied resulted in dispositions other than simple affirmance, reversal, or remand. These "split decisions" have been broken into their component parts in order to present a more complete picture of appellate review while still preserving a single outcome per case for purposes of the empirical analysis. The most common disposition that did not unilaterally favor either party involved situations in which the court reached differing results with respect to the compensatory and punitive components of the judgment, as for example, when compensatory damages were affirmed but punitive damages were either reversed or remanded. A smaller number of cases that were affirmed as to liability but remitted as to the size of the damage award are also categorized separately in Tables 1-5.

Table 2 examines the effect of independent appellate review on defendants' appeals by contrasting the results in cases in which the heightened level of scrutiny was applied with those cases in which it was not. Included among the decisions in which independent appellate review was considered not to have been applied are cases in which (1) the issue of actual malice was not presented or (2) the court applied a judgment n.o.v. standard even though the issue of actual malice was presented or (3) the court reversed on an issue of law but remanded without independently reviewing the record.

Table 3 presents the results of plaintiffs' appeals. Three of the four "reversals" were appellate decisions reinstating jury verdicts that had either been reversed[6] or modified[7] by the

[6]*See Locricchio, infra*, p. A15. This reversal was itself later reversed. *See infra*, p. B10.

trial court or an intermediate appellate court,[8] The remaining case,[9] itself later reversed on appeal, took the unusual step of reversing the jury's finding for the defendant on the issue of actual malice, purporting to impose liability while remanding for calculation of damages.

Table 4 examines the effect of independent appellate review on plaintiffs' appeals, utilizing the same criteria as in Table 2 to identify cases that were considered not to have applied independent appellate review. Although there would appear to be no constitutional right threatened by a judgment entered on behalf of a libel defendant, slightly more than half the appellate courts nevertheless applied independent appellate review to plaintiffs' appeals. It is notable that defendants' judgments were affirmed far more frequently and reversed somewhat less often when independent appellate review was applied than when a more deferential standard of review was employed. Although perhaps initially counterintuitive, and the number of cases examined is rather small to draw broad conclusions, this result adds support to the notion that when courts apply independent appellate review, they are more likely to rule in favor of defamation defendants -- regardless of which party had prevailed in the lower court.

Tables 5A and **5B** examine the effect of the status of the parties on defendants' and plaintiffs' appeals, respectively, over the ten-year period studied. Plaintiffs were categorized according to whether they had been held by the appellate court to be public or private figures, and defendants were divided into media and nonmedia categories. Although these tables do not present aggregated data on overall success rates of media versus nonmedia defendants, such figures, which are readily calculable from the tables, indicate that media defendants achieved a slightly higher rate of reversals on their appeals than did nonmedia defendants (42.6% versus 38.7%) and also experienced a slightly lower rate of complete affirmances (26.2% versus 32.3%).

Table 6 examines the effect of independent appellate review on the constituent issues presented in defendants' appeals, contrasting the court's disposition of each of these issues based on the standard of review applied by the appellate court. For the issue of actual malice, "no IAR" refers to situations in which it was either unclear whether independent appellate review was being applied or in which the court reversed on an issue of law and elected to leave consideration of actual malice to the jury on remand. As to the remaining issues, "no IAR" refers to application of a "clearly erroneous" standard of review. The table presents all issues identified, regardless of the number of cases in which they were dispositive, and regardless of our assessment of their significance.

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[7] *See Brown & Williamson, infra,* p. A5.

[8] *See Ball, infra*, p. B6.

[9] *See Brown, infra*, p. A11.

TABLE 1: RESULTS OF DEFENDANTS' APPEALS

	Number	Reversed		Reversed Punitive Damages, Affirmed Compensatory Damages		Reversed and Remanded		Affirmed Compensatory Damages Remanded Punitive Damages		Affirmed with Remittitur		Affirmed	
		#	%	#	%	#	%	#	%	#	%	#	%
FROM *BOSE* TO *CONNAUGHTON*													
Federal cases	15	7	46.7%	1	6.7%	2	13.3%	1	6.7%	0	0.0%	4	26.7%
State cases	44	16	36.4%	5	11.4%	7	15.9%	0	0.0%	5	11.4%	11	25.0%
Total	59	23	39.0%	6	10.2%	9	15.3%	1	1.7%	5	8.5%	15	25.4%
POST-*CONNAUGHTON*													
Federal cases	6	3	50.0%	0	0.0%	0	0.0%	0	0.0%	2	33.3%	1	16.7%
State cases	27	12	44.4%	0	0.0%	4	14.8%	1	3.7%	0	0.0%	10	37.0%
Total	33	15	45.5%	0	0.0%	4	12.1%	1	3.0%	2	6.1%	11	33.3%
1984-1994													
Federal cases	21	10	47.6%	1	4.8%	2	9.5%	1	4.8%	2	9.5%	5	23.8%
State cases	71	28	39.4%	5	7.0%	11	15.5%	1	1.4%	5	7.0%	21	29.6%
Total	92	38	41.3%	6	6.5%	13	14.1%	2	2.2%	7	7.6%	26	28.3%

TABLE 2: EFFECT OF INDEPENDENT APPELLATE REVIEW ON DEFENDANTS' APPEALS													
	#	Reversed		Reversed Punitive Damages, Affirmed Compensatory Damages		Reversed and Remanded		Affirmed Compensatory Damages, Remanded Punitive Damages		Affirmed with Remittitur		Affirmed	
		#	%	#	%	#	%	#	%	#	%	#	%
FROM *BOSE* TO *CONNAUGHTON*													
Fed IAR	9	5	55.6%	1	11.1%	0	0.0%	0	0.0%	0	0.0%	3	33.3%
Fed no IAR	6	2	33.3%	0	0.0%	2	33.3%	1	16.7%	0	0.0%	1	16.7%
State IAR	26	12	46.2%	4	15.4%	0	0.0%	0	0.0%	3	11.5%	7	26.9%
State no IAR	18	4	22.2%	1	5.6%	7	38.9%	0	0.0%	2	11.1%	4	22.2%
Total IAR	35	17	48.6%	5	14.3%	0	0.0%	0	0.0%	3	8.6%	10	28.6%
Total no IAR	24	6	25.0%	1	4.2%	9	37.5%	1	4.2%	2	8.3%	5	20.8%
POST-*CONNAUGHTON*													
Fed IAR	5	3	60.0%	0	0.0%	0	0.0%	0	0.0%	2	40.0%	0	0.0%
Fed no IAR	1	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	100.0%
State IAR	14	9	64.3%	0	0.0%	3	21.4%	0	0.0%	0	0.0%	2	14.3%
State no IAR	13	3	23.1%	0	0.0%	1	7.7%	1	7.7%	0	0.0%	8	61.5%
Total IAR	19	12	63.2%	0	0.0%	3	15.8%	0	0.0%	2	10.5%	2	10.5%
Total no IAR	14	3	21.4%	0	0.0%	1	7.1%	1	7.1%	0	0.0%	9	64.3%
CASES FROM 1984 TO 1994													
Fed IAR	14	8	57.1%	1	7.1%	0	0.0%	0	0.0%	2	14.3%	3	21.4%
Fed no IAR	7	2	28.6%	0	0.0%	2	28.6%	1	14.3%	0	0.0%	2	28.6%
State IAR	40	21	52.5%	4	10.0%	3	7.5%	0	0.0%	3	7.5%	9	22.5%
State no IAR	31	7	22.6%	1	3.2%	8	25.8%	1	3.2%	2	6.5%	12	38.7%
Total IAR	54	29	53.7%	5	9.3%	3	5.6%	0	0.0%	5	9.3%	12	22.2%
Total no IAR	38	9	23.7%	1	2.6%	10	26.3%	2	5.3%	2	5.3%	14	36.8%

TABLE 3: RESULTS OF PLAINTIFFS' APPEALS

	Number	Reversed		Reversed Punitive Damages, Affirmed Compensatory damages		Reversed and Remanded		Affirmed Compensatory Remanded Punitive Damages		Affirmed with Remittitur		Affirmed	
		#	%	#	%	#	%	#	%	#	%	#	%
FROM *BOSE* TO *CONNAUGTON*													
Federal	6	1	16.7%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	5	83.3%
State	7	2	28.6%	0	0.0%	2	28.6%	0	0.0%	0	0.0%	3	42.9%
Total	13	3	23.1%	0	0.0%	2	15.4%	0	0.0%	0	0.0%	8	61.5%
POST-*CONNAUGTON*													
Federal	3	0	0.0%	0	0.0%	1	33.3%	0	0.0%	0	0.0%	2	66.7%
State	4	1	25.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	3	75.0%
Total	7	1	14.3%	0	0.0%	1	14.3%	0	0.0%	0	0.0%	5	71.4%
1984-1994													
Federal	9	1	11.1%	0	0.0%	1	11.1%	0	0.0%	0	0.0%	7	77.8%
State	11	3	27.3%	0	0.0%	2	18.2%	0	0.0%	0	0.0%	6	54.5%
Total	20	4	20.0%	0	0.0%	3	15.0%	0	0.0%	0	0.0%	13	65.0%

TABLE 4: EFFECT OF INDEPENDENT APPELLATE REVIEW ON PLAINTIFFS' APPEALS

	Number	Reversed		Reversed Punitive Damages, Affirmed Compensatory Damages		Reversed and Remanded		Affirmed Compensatory Damages Remanded Punitive Damages		Affirmed with Remittitur		Affirmed	
		#	%	#	%	#	%	#	%	#	%	#	%
FROM *BOSE* TO *CONNAUGHTON*													
Fed IAR	4	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	4	100.0%
Fed no IAR	2	1	50.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	50.0%
State IAR	5	1	20.0%	0	0.0%	1	20.0%	0	0.0%	0	0.0%	3	60.0%
State no IAR	2	1	20.0%	0	0.0%	1	20.0%	0	0.0%	0	0.0%	0	0.0%
Total IAR	9	1	11.1%	0	0.0%	1	11.1%	0	0.0%	0	0.0%	7	77.8%
Total no IAR	4	2	50.0%	0	0.0%	1	25.0%	0	0.0%	0	0.0%	1	25.0%
POST-*CONNAUGHTON*													
Fed IAR	0	0	----	0	----	0	----	0	----	0	----	0	----
Fed no IAR	3	0	0.0%	0	0.0%	1	33.3%	0	0.0%	0	0.0%	2	66.7%
State IAR	2	1	50.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	50.0%
State no IAR	2	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	2	100.0%
Total IAR	2	1	50.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	50.0%
Total no IAR	5	0	0.0%	0	0.0%	1	20.0%	0	0.0%	0	0.0%	4	80.0%
1984-1994													
Fed IAR	4	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	4	100.0%
Fed no IAR	5	1	20.0%	0	0.0%	1	20.0%	0	0.0%	0	0.0%	3	60.0%
State IAR	7	2	28.6%	0	0.0%	1	14.3%	0	0.0%	0	0.0%	4	57.1%
State no IAR	4	1	25.0%	0	0.0%	1	25.0%	0	0.0%	0	0.0%	2	50.0%
Total IAR	11	2	18.2%	0	0.0%	1	9.1%	0	0.0%	0	0.0%	8	72.7%
Total no IAR	9	2	22.2%	0	0.0%	2	22.2%	0	0.0%	0	0.0%	5	55.6%

TABLE 5A: APPEALS BY PARTY STATUS -- DEFENDANTS' APPEALS

	#	Reversed		Reversed Punitive Damages, Affirmed Compensatory Damages		Reversed and Remanded		Affirmed Compensatory Damages, Remitted Punitive Damages		Affirmed with Remittitur		Affirmed	
		#	%	#	%	#	%	#	%	#	%	#	%
PUBLIC FIGURE													
Media defendant	37	21	56.8%	1	2.7%	6	16.2%	0	0.0%	1	2.7%	8	21.6%
Nonmedia defendant	15	9	60.0%	0	0.0%	0	0.0%	0	0.0%	1	6.7%	5	33.3%
All public figures	52	30	57.7%	1	1.9%	6	11.5%	0	0.0%	2	3.8%	13	25.0%
PRIVATE FIGURE													
Media defendant	24	5	20.8%	5	20.8%	2	8.3%	2	8.3%	2	8.3%	8	33.3%
Nonmedia defendant	16	3	18.8%	0	0.0%	4	25.0%	1	6.3%	3	18.8%	5	31.3%
All private figures	40	8	20.0%	5	12.5%	6	15.0%	3	7.5%	5	12.5%	13	32.5%

TABLE 5B: APPEALS BY PARTY STATUS -- PLAINTIFFS' APPEALS

	#	Reversed		Reversed Punitive Damages, Affirmed Compensatory Damages		Reversed and Remanded		Affirmed Compensatory Remitted Punitive Damages		Affirmed with Remittitur		Affirmed	
		#	%	#	%	#	%	#	%	#	%	#	%
PUBLIC FIGURE													
Media defendant	13	3	23.1%	0	0.0%	1	7.7%	0	0.0%	0	0.0%	9	69.2%
Nonmedia defendant	2	0	0.0%	0	0.0%	1	50.0%	0	0.0%	0	0.0%	1	50.0%
All public figures	15	3	20.0%	0	0.0%	2	13.3%	0	0.0%	0	0.0%	10	66.7%
PRIVATE FIGURE													
Media defendant	2	1	50.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	50.0%
Nonmedia defendant	3	0	0.0%	0	0.0%	1	33.3%	0	0.0%	0	0.0%	2	66.7%
All public figures	5	1	20.0%	0	0.0%	1	20.0%	0	0.0%	0	0.0%	3	60.0%

TABLE 6: DISPOSITION BY ISSUE -- DEFENDANTS' APPEALS

	#	% applied	Reversed		Remanded		Remitted		Affirmed	
			#	%	#	%	#	%	#	%
Actual malice (77 cases)										
IAR	54	70.1%	36	66.7%	0	0.0%	0	0.0%	18	33.3%
No IAR	18	23.4%	1	5.6%	9	50.0%	0	0.0%	8	44.4%
JNOV	5	6.5%	3	60.0%	0	0.0%	0	0.0%	2	40.0%
CL malice (3 cases)										
IAR	2	66.7%	1	50.0%	0	0.0%	0	0.0%	1	50.0%
No IAR	1	33.3%	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Negligence (15 cases)										
IAR	2	13.3%	0	0.0%	0	0.0%	0	0.0%	2	100.0%
No IAR	12	80.0%	0	0.0%	0	0.0%	0	0.0%	12	100.0%
Legal review	1	6.7%	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Falsity (20 cases)										
IAR	6	30.0%	5	83.3%	0	0.0%	0	0.0%	1	16.7%
No IAR	12	60.0%	1	8.3%	0	0.0%	0	0.0%	11	91.7%
JNOV	2	10.0%	0	0.0%	0	0.0%	0	0.0%	2	100.0%
Defamatory meaning (13 cases)										
IAR	4	30.8%	3	75.0%	0	0.0%	0	0.0%	1	25.0%
No IAR	8	61.5%	0	0.0%	0	0.0%	0	0.0%	8	100.0%
JNOV	1	7.7%	0	0.0%	0	0.0%	0	0.0%	1	100.0%
Identification (4 cases)										
IAR	1	25.0%	1	100.0%	0	0.0%	0	0.0%	0	0.0%
No IAR	3	75.0%	0	0.0%	0	0.0%	0	0.0%	3	100.0%
Fair report (7 cases)										
IAR	2	28.6%	1	50.0%	0	0.0%	0	0.0%	1	50.0%
No IAR	3	42.9%	0	0.0%	0	0.0%	0	0.0%	3	100.0%
De novo legal	2	28.6%	1	50.0%	0	0.0%	0	0.0%	1	50.0%

TABLE 6: DISPOSITION BY ISSUE – DEFENDANTS' APPEALS										
	#	% applied	Reversed		Remanded		Remitted		Affirmed	
			#	%	#	%	#	%	#	%
Size of award (21 cases)										
IAR	1	4.8%	0	0.0%	0	0.0%	1	100.0%	0	0.0%
No IAR	19	90.5%	0	0.0%	1	5.3%	6	31.6%	12	63.2%
De novo legal	1	4.8%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Opinion (6 cases)										
IAR	2	33.3%	2	100.0%	0	0.0%	0	0.0%	0	0.0%
De novo legal	4	66.7%	2	50.0%	0	0.0%	0	0.0%	2	50.0%
Privilege (4 cases)										
Clear error	1	25.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
De novo legal	3	75.0%	1	33.3%	0	0.0%	0	0.0%	2	66.7%

V. APPLICATION OF INDEPENDENT APPELLATE REVIEW

Identifying when independent appellate review is being applied, whether it is being properly applied, and the effects of its application is not simply a matter of empiricizing results of prior cases but requires consideration of the tensions underlying its application in various contexts.

Application to Actual Malice. As noted *supra* in Section II.C, even though it is uncontroverted that independent appellate review must be applied to the issue of actual malice, courts are in disagreement as to whether only the "ultimate constitutional fact" of actual malice need be reviewed, with underlying or subsidiary facts to be reviewed under the "clearly erroneous" standard,[10] or on the other hand whether *Sullivan* and *Bose* require courts to independently review *all* underlying facts and possible inferences.[11] In addition, the LDRC study identified at least two key courts that expressly avoided deciding the issue, either -- as did the Seventh Circuit in *Brown & Williamson*[12] -- by independently reviewing *all* facts but nevertheless finding clear and convincing evidence of actual malice, or -- as did the D.C. Circuit in *Tavoulareas*[13] -- by viewing all evidence in the light most favorable to the plaintiff but nevertheless finding insufficient evidence of actual malice to support the verdict. In the cases where courts crystalized such distinctions, defendants fared slightly worse on their own appeals and slightly better on plaintiffs' appeals than they did in the aggregate of cases studied -- of the five defendants' appeals cited in footnote 10, one (20%) resulted in a complete reversal, two (40%) resulted in split decisions, and two (40%) were affirmed; of the four plaintiffs' appeals cited in the same footnote, three (75%) resulted in affirmances of the defendant's verdict and only one (25%) resulted in a reversal. *Compare* Tables 1 and 3. In the great majority of cases, however, courts felt it unnecessary to make such fine distinctions in order to effectively apply the doctrine of independent appellate review. Although perhaps not intellectually satisfying, the results of the LDRC study clearly indicate that regardless of the fineness with which independent appellate review is applied, defendants continue overall to benefit from this heightened level of

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[10]*See, e.g., Connaughton (6th Cir.), infra*, p. A5; *Bartimo, infra*, p. A3; *McKinley, infra*, p. A3; *National Association of Government Employees, infra*, p. A4; *Starkins, infra*, p. A10; *Wanless, infra*, p. A12; *Gazette, infra*, p. A23; *Brown, infra*, p. B2; *Ball, infra*, p. B6.

[11]*See, e.g., McCoy*, infra p. A10 ("[appellate] court must independently review all the evidence on the issue of actual malice"); *Prozeralik, infra*, p. B13 ("heightened review responsibility does not preclude consideration of all of the factual record in full ... We must be sure 'undue weight' was not given to the jury's findings ... and that an 'independent review' was conducted"); *see also Newton, infra*, p. B4 ("even when we accord credibility determinations the special deference to which they are entitled, we must nevertheless 'examine for ourselves' the factual record in full").

[12]*See infra*, p. A5.

[13]*See infra*, p. A8.

appellate scrutiny.

Application to Falsity. The LDRC survey found that 30% of courts that considered the issue applied independent appellate review to the issue of falsity (see Table 6).[14] Some of these courts did so explicitly,[15] reasoning that since under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the plaintiff bears the burden of proof of falsity, independent appellate review of this issue is required. Moreover, it is arguable that because the issue of falsity is so intimately intertwined with the issue of actual malice that independent appellate review is required. Indeed, two of the courts categorized as having applied independent appellate review to the issue of falsity did so as part of their review of actual malice without expressly stating that independent appellate review is required for falsity.[16] Most courts, however, continue to apply a clearly erroneous standard to the falsity issue, although few such courts have explicitly rejected the extension of independent appellate review to this issue, however.[17]

Application to Negligence. Appellate review of the issue of negligence arises in the context of an action brought by a private figure in a state where that lesser standard of fault has been adopted under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Results of the LDRC study indicate that 80% of courts that have reviewed negligence have done so under the clearly erroneous standard (see Table 6). At least two jurisdictions have explicitly rejected the concept of extending independent appellate review beyond the issue of actual malice.[18] The LDRC survey uncovered two courts (13.3% of courts presented with the question) that applied independent appellate review to the issue of negligence,[19] but in one of those cases it is questionable whether the review extended beyond lip service to the doctrine.[20]

Application to Other Issues. Lastly, some courts have extended independent appellate review to such issues as defamatory meaning, "of and concerning," and even to the size of the

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[14]*See Brown & Williamson, infra*, p. A5; *Diesen, infra*, p. A15; *Locricchio, infra*, p. A15; *Deaver, infra*, p. A16; *Lyons, infra*, p. A21; *Rouch, infra*, p. B11.

[15]*See Diesen, infra*, p. A15; *Locricchio, infra*, p. A15; *Rouch, infra*, p. B11.

[16]*See Deaver, infra*, p. A16; *Lyons, infra*, p. A21.

[17]*But see Connaughton (6th Cir.), infra*, p. A4; *Levine, infra*, p. A2.

[18]*See Levine, infra*, p. A2; *Gazette, infra*, p. A23.

[19]*See Miami Herald, infra*, p. A12; *Brown v. Petrolite, infra*, p. B2.

[20]*See Miami Herald.* Following two pages of review of legal issues, the court concludes: "Having independently examined the whole record ... we agree with the district court that there was sufficient evidence on both issues upon which the jury could have reasonably found for the plaintiff."

award.[21] These courts extended independent appellate review not on the basis of some detailed consideration of the precise reach of the doctrine to such other issues, but simply based on a broad and unconditional application of the doctrine itself, under which all issues presented were embraced. It is thus not surprising that of the four decisions noted in footnote 21, three reversed outright, and the fourth, although more limited in its extension of independent appellate review, remitted the punitive damages because of a concern that the size of the award threatened constitutionally protected speech.

Effect of JNOVs and Directed Verdicts (Judgments as a Matter of Law). Another complicating factor is the interplay between independent appellate review and the highly deferential standard of review traditionally applied to motions for judgment n.o.v. or directed verdict (or, in federal court, judgment as a matter of law[22]), in which all evidence, and all reasonable inferences therefrom, is viewed in the light most favorable to the nonmovant. In the LDRC study, this standard was encountered most frequently in the context of plaintiffs' appeals from trial court grants of defendants' motions for directed verdict[23] or judgment n.o.v.[24]. The LDRC study also identified a small number of state courts that applied this highly deferential standard of review to appeals from *denials* of defendants' motions for judgment n.o.v., however.[25] As post-trial motions for judgment n.o.v. are routinely made by losing defendants, and may even be a prerequisite to appeal in some jurisdictions, application of a judgment n.o.v. standard without due consideration of the heightened scrutiny required by *Sullivan* and *Bose* can all but eviscerate independent appellate review.

Effect of Reversals Based on Other Legal Error. The highly deferential standard of review required for judgments as a matter of law also has the potential to blunt independent appellate review in contexts other than direct appeals from the denial or grant of these motions. For example, the LDRC study uncovered numerous instances in which reversal was mandated

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[21]For defamatory meaning, *see Dixon, infra,* p. B15; *Dodson, infra,*, p. B5; for "of and concerning," *see Deaver, supra*, p. A16; for award size, *see Fleming, supra*, p. A25.

[22]Under the 1991 amendments to Rule 50 of the *Federal Rules of Civil Procedure*, "judgment as a matter of law" replaces the separate concepts of directed verdict and judgment n.o.v.

[23]*See Weldy, infra*, p. B1.

[24]*See, e.g., Pemberton, infra,* p. A9. *See also Tavoulareas, infra*, p. A8 (en banc review of trial court grant of judgment n.o.v., which was reversed by panel opinion).

[25]*See, e.g., Tosti, infra*, p. A14; *Sprague, infra*, p. A18; *Stickney, infra*, p. A19; *Curran, infra*, p. A20; *Major, infra*, p. A21. *Cf. Pemberton, infra*, p. A9.

by trial court errors on such legal issues as jury instructions,[26] admission of evidence,[27] or plaintiff status,[28] and the appellate court was required to decide whether to reverse outright or remand for a new trial under the correct legal standard. Because the issue of actual malice was either often fully developed at trial -- as, for example, where a plaintiff who had erroneously been treated as a private figure had also sought to recover punitive damages -- or unaffected by erroneous jury instructions, some courts reversed outright, after independently reviewing the record.[29] However, other courts elected to remand, some framing their review in terms of what a jury "might have found" on the issue of actual malice, and modifying the rigorous scrutiny of independent appellate review with the highly deferential standard of review applied to judgments as a matter of law.[30] Other courts simply remanded without independently attempting to determine the presence of actual malice.[31] In either instance, this approach neuters the heightened level of scrutiny of independent appellate review and would appear to violate both the rule and the spirit of *Sullivan*, which itself reached through a record built on an entire different legal standard to assess the issue of actual malice. Thus, for purposes of data analysis, courts that remanded after reversing on an issue of law have been categorized in Table 2 as not having applied independent appellate review, regardless of whether they cited *Sullivan* or *Bose*.

Effect of Applying Independent Appellate Review to Issues of Law. Finally, the LDRC study identified a small number of courts that invoked independent appellate review when reviewing issues of law already subject to *de novo* review under standards generally applicable

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[26]*See Marcone, infra*, p. A1; *Douglass, infra*, p. A5; *Bagley, infra*, p. A6; *Straw, infra*, p. A7; *McNair, infra*, p. A10; *Rabren, infra*, p. A12; *Sprague, infra*, p. A19; *Martin, infra*, p. A20; *Beckham, infra*, p. A22; *Reuber, infra*, p. B1; *Carney, infra*, p. B5; *Oweida, infra*, p. B14

[27]*See Douglass, infra*, p. A5; *Hines, infra*, p. B7; *Ingles, infra*, p. B15.

[28] *See Lerman, infra*, p. A1; *Marcone, infra*, p. A1; *McDowell, infra*, p. A2; *Dombey, infra*, p. A9; *J & C Inc.*, p. A14.

[29]*See Lerman, infra*, p. A1; *Marcone, infra*, p. A1; *McDowell, infra*, p. A2.

[30]*See Dombey, infra*, p. A9; *J & C Inc.*, p. A14. The *Dombey* court distinguished between appellate review of actual malice following a jury verdict and appellate review of actual malice when the jury had yet to consider that issue, explicitly rejecting the approach of the Third Circuit in *Marcone* as insufficiently sensitive to the plaintiff's right to a jury trial.

[31]*See Douglass, infra*, p. A5; *Bagley, infra*, p. A6; *Straw, infra*, p. A7; *McNair, infra*, p. A10; *Rabren, infra*, p. A12; *Sprague, infra*, p. A19; *Martin, infra*, p. A20; *Beckham, infra*, p. A22; *Carney, infra*, p. B5; *Oweida, infra*, p. B14.

in all civil cases.[32] Rather than redundancy or superfluity, however, this may be reflective of a heightened sensitivity to the constitutional issues involved -- a view given some support by the fact that in all these cases the lower court decisions were reversed outright. In sum, here as with all of the other complicating factors discussed above, the LDRC study suggests that the very incantation of the doctrine of independent appellate review is itself of central significance, regardless of how rigorously it is applied or indeed whether, as a technical matter, its application is even required.

Application of Independent Appellate Review in the Summary Judgment Context. The requirement of independent appellate review was initially formulated, and has most frequently been applied, in the context of appeals from final plenary judgments. The premise of independent appellate review is that it is the extraordinary duty of an appellate court to go beyond the normally deferential review of a trial record -- and to independently review the entire record -- in order to assure that any final judgment sought to be affirmed does not violate sensitive first amendment rights of constitutional dimension.

Numerous appellate courts have taken independent appellate review beyond the review of final judgments and have applied the doctrine in the context of both defendants' and plaintiffs' appeals from the denial or grant of motions for summary judgment or motions to dismiss. As is true in the context of appeals from plenary judgments, independent appellate review has most frequently been applied to the issue of actual malice.[33] Some courts have extended the doctrine to the question of falsity[34] and negligence[35] as well as opinion.[36]

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[32]*See, e.g., Keohane (opinion), infra*, p. B5 *Diesen (opinion), infra*, p. A15; *Major (plaintiff status), infra*, p. A21.

[33]*See, e.g., Dunn v. Gannett New York*, 833 F.2d 446 (3d Cir. 1987); *Zerangue v. TSP Newspapers*, 814 F.2d 1066 (5th Cir. 1987); *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir. 1989); *Crane v. The Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992); *Liberty Lobby, Inc. v. Dow Jones & Company, Inc.*, 838 F.2d 1287 (D.C. Cir. 1988); *Liberty Lobby, Inc., v. Rees*, 852 F.2d 595 (D.C. Cir. 1988); *Clyburn v. New World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *Scottsdale Publishing v. Superior Court*, 159 Ariz. 72, 764 P.2d 1131 (Ariz. Ct. App. 1988); *Currier v. Western Newspapers Inc.*, 18 Med. L. Rptr. 2359 (Ariz. Ct. App. 1991) (unpublished); *Wiemer v. Rankin*, 117 Ida. 566, 790 P.2d 347 (Ida. 1990); *Davern v. Midwest Communications, Inc..*, 1993 WL 527905 (Minn. App. 1993) (unpublished); *Abernathy & Closther v. Buffalo Broadcasting Co. Inc.*, 176 A.D.2d 300, 574 N.Y.S.2d 568 (N.Y. App. Div. 1991); *Varanese v. Gall*, 35 Ohio St.3d 78, 518 N.E.2d 1177 (Ohio 1988).

[34]*See Liberty Lobby, Inc. v. Dow Jones & Company, Inc.*, 838 F.2d 1287 (D.C. Cir. 1988); *Koniak v. Heritage Newspapers, Inc.*, 198 Mich.App. 577, 499 N.W.2d 346 (Mich. Ct. App. 1993).

The rationale behind extending independent appellate review to appeals from summary judgment is eloquently set forth by the D.C. Circuit in *Liberty Lobby, Inc., v. Dow Jones & Company, Inc.*, a case reviewing and affirming the trial court's grant of the defendants' motion for summary judgment:

> First Amendment concerns also affect a court's posture in reviewing the evidence presented on summary judgment. Normally the evidence presented upon a motion for summary judgment is construed in favor of the party opposing the motion. As to the nonconstitutional issues in a libel action, this standard still obtains. However, where the constitutional prerequisites of falsity and actual malice are at issue, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *While Bose and prior cases involved appellate review of trial verdicts in libel actions, logic and considerations of judicial administration dictate that the same level of review apply to the granting of summary judgment.*"[37]

VI. PRACTITIONERS' ROUNDTABLE: VIEWS ON INDEPENDENT APPELLATE REVIEW FROM THE FIRING LINE

To round out LDRC's study of independent appellate review, and in order to move the analysis beyond a merely empirical and macrocosmic presentation, several leading media defense counsel, with significant appellate experience, were invited to share their "practitioner's" insights regarding independent appellate review for the benefit of *Bulletin* readers.

FLOYD ABRAMS, a partner in the New York City firm of Cahill, Gordon and Reindel, represented media defendants in three of the appeals in the new LDRC study -- *Prozeralik v. Capital Cities Communications, Inc.* (N.Y. Ct. App.), *Newton v. National Broadcasting Co., Inc.* (9th Cir.) and *Bressler v. Fortune Magazine* (6th Cir.).

PETER F. AXELRAD, a partner in the Baltimore-Washington firm of Jackson &

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[35]*Jadwin v. Minneapolis Star*, 367 N.W.2d 476 (Minn. 1985) ("since a finding of negligence is also a matter of constitutional fact, we will conduct a de novo review of such finding on appeal") .

[36]*See Morningstar, Inc. v. Pilgrim Group, Inc.*, --- Cal.Rptr.2d ---, 1994 WL 86169 (Cal. Ct. App. 1994) (on demurrer); *Moyer v. Amador Valley Joint Union High School District*, 225 Cal.App.3d 720, 275 Cal.Rptr. 494 (Cal. Ct. App. 1990) (on demurrer); *Living Will Center v. KCNC-TV* 21 Med. L. Rptr. 1208 (Col. Ct. App. 1993).

[37]838 F.2d 1287, 1293 (D.C. Cir. 1988) (Bork, J.) (internal citations omitted) (italics added).

Campbell, represented the defendant in the latter of the two appeals in *Batson v. Shiflett* (Md. Ct. App.).

LEE LEVINE, a partner in the Washington, D.C. office of Ross, Dixon & Masback, argued *Harte-Hanks Communications, Inc. v. Connaughton* in the United States Supreme Court and also represented a coalition of media amici curiae in *Reuber v. Food Chemical News, Inc.* (4th Cir.). Mr. Levine is also author of *"Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart,"* 35 AM. UNIV. L. REV. 3 (1985), which explores the subject of independent appellate review in defamation cases.

RICHARD E. RASSEL, a partner in the Detroit firm of Butzel Long, represented the media defendant in both appeals in *Locricchio v. Evening News Association* (Mich. Ct. App.; Sup. Ct. Mich.). Mr. Rassel is also coauthor of "Connaughton v. Harte Hanks *and the Independent Review of Libel Verdicts*," 20 TOLEDO L. REV. 681 (1989).

LDRC: *As you all well know, the Supreme Court in Sullivan and Bose accorded to media defense counsel and their clients in defamation and related First Amendment cases not only the gift of a strict substantive legal standard but also important procedural protections, including the principle of independent appellate review. Of course, as with all protections, the precise scope of this benefit can only be fleshed out over time aided by the care and creativity of practitioners like yourselves.*

Initially, is it your view, 30 years after Sullivan, *that most appellate courts are now well versed on, and comfortable with, the necessity to accord independent appellate review in defamation cases or do you find that it is still an uphill battle to prevail upon the court to apply the special, constitutionally mandated standard of review in lieu of the normally more deferential process of appellate review of civil judgments?*

ABRAMS: Almost all appellate courts are now willing to articulate correctly their obligation to accord independent review; the hard thing is to persuade them to do so in a manner that is meaningful -- that is to say, meaningfully demanding.

AXELRAD: Our state appellate courts are familiar with the standard of independent appellate review. The Fourth Circuit is also familiar with the standard. The most salient question is whether the courts merely give the independent standard lip service, which generally relates to how they feel about the facts.

LEVINE: After *Bose* and *Connaughton*, I think we are well past the point where appellate courts have to be convinced to undertake independent review, at least in the context of appeals from the entry of judgment following a trial. The real challenge remains convincing them that "independent review" means a searching review of the entire record and making an independent judgment about whether the record can be said to contain clear and convincing evidence of constitutional malice. Both before and after *Connaughton*, too many appellate courts talk the talk of independent review, but in fact defer to the judgment of the trial court. *Bose* and *Connaughton*, of course, are less than clear about at least some aspects of what independent review entails, which affords appellate judges some latitude to fall back, as a practical matter, on standards of review with which they are comfortable.

RASSEL: In my experience it is still uphill all the way. Appellate judges are busy people (read their law clerks). You are asking them to do more work than they normally are called upon to do.

LDRC: *To get the appellate court into the right frame of mind, is it sufficient merely to cite to and incant* Sullivan *and* Bose *or do you find that it is necessary to bolster your preliminary arguments by reference either to the general importance of constitutional protections or else perhaps by reference to considerations or equities peculiar to the particular appeal?*

ABRAMS: It remains necessary, in my view, to articulate why independent review is required and to articulate, as well, *each* of the changes effected by *Sullivan*, including the plaintiff's burden of proving falsity, the plaintiff's burden of proving (and the nature of) actual malice, and the centrality of independent review.

AXELRAD: I find that it is generally sufficient to cite to *Sullivan* and *Bose* in the briefs. However, in oral argument it is generally the better rule, after surveying the panel of judges, to determine whether the rule of independent review should be emphasized.

LEVINE: If your client has lost a jury verdict, and you have concluded that your best bet for appellate reversal is on the issue of constitutional malice, you better be prepared to give the court of appeals far more than a bunch of First Amendment platitudes. You must explain how independent review works and how it differs, as a very practical matter, from other standards of review. The "introduction" that you provide the appellate court to independent review must prepare those judges for how they are supposed to look at the record you are about to place before them.

RASSEL: The ritual incantations are not only necessary, they are essential to getting the courts to differentiate this particular class of appeals from other less specialized appeals.

LDRC: *Some of you have tried the cases in which you were then required to take appeals and others of you were brought in for the purpose of the appeal and have inherited the trial record. Have you found that there exists tension between the evidence put before (or kept from) the jury and the evidence you would ideally like to have in the record to put before the appellate court for purposes of independent review? And how have you dealt with this tension in preparing the record for appellate review?*

ABRAMS: Appellate lawyers always complain about their records on appeal -- unless, of course, they tried the case below. Sometimes they are right to complain, especially when the record is lacking in what sometimes seems to trial lawyers to be ritualistic incantations by reporters and editors of their belief in their stories. This may seem a bit unreal, but it's needed.

AXELRAD: There is always a wish by appellate counsel that something would have been in or out of the record. Obviously, counsel emphasizes "the best of the record" below. The trial court's style and history with the appellate court may be useful in demonstrating to the appellate court that the record was unfairly restricted by the trial judge.

LEVINE: There is no question that someone on the defense trial team of a news media defamation action must be the keeper of the appellate record, especially with respect to constitutional malice. (The very best plaintiff's counsel, by the way, do so as well.) Even with independent review, appellate courts will resolve disputed issues of historical fact in favor of the prevailing party at trial. Thus, it is often crucial that the trial evidence come in with an eye toward establishing *undisputed* facts that the defendant can point to in the court of appeals to negate a finding of constitutional malice. The appellate court, after all, is required to consider the *entire* record and, if that record is laced with enough unrebutted evidence favoring the defendant, it will be difficult to conclude that there is "clear and convincing" evidence of constitutional malice, even if the plaintiff has introduced some contrary evidence with respect to other historical facts.

RASSEL: I personally have not had much trouble with an inadequate trial record. One way or another my experience is that I have been able to get enough into the record to paint the plaintiff in any shade I wish.

LDRC: *As you know, although* Bose *expressly required independent appellate review of the issue of actual malice, the Court did not address the scope of its application, for example, to other constitutionally sensitive issues like negligence and falsity. Our study has found that at least some courts have extended the concept of independent appellate review to such issues while other courts have expressly* *rejected a broader application. What arguments have you found to be most persuasive in convincing courts to independently review the broadest possible range of issues, and have you found that it is best to address the question of scope head on or simply to generally argue for independent appellate review and leave it to your adversary to attempt to limit it?*

ABRAMS: I have found it best to blur these issues and to treat them as inseparable.

AXELRAD: The court should look with a jaundiced eye on all issues in order to safeguard the First Amendment. Nonetheless, as a tactical matter, it may be the better route to announce the general rule and leave it up to the adversary to limit the review of the record. It is also fair to state that the rule is probably more directed to the concept of reviewing for evidence of actual malice in the record, because of greater First Amendment concerns surround the actual malice standard.

LEVINE: First, in *Sullivan* itself, the Supreme Court extended the concept of independent review beyond constitutional malice to the "of and concerning" issue as well. Reminding the court of appeals of that can go a long way toward convincing it that independent review applies to all issues of constitutional significance. Second, the Court in *Connaughton*, for the first time, said that constitutional malice is an issue of law, which explains why its resolution at trial is subject to independent review in the first place. Other First Amendment-driven issues are also, at bottom, issues of law, even though their resolution can be affected by the historical facts of the case. Such issues -- including negligence and falsity -- can be said, after *Connaughton*, to be the subject of independent review on the same basis as constitutional malice.

Whether or not to address this issue head on with the appellate court requires a careful evaluation of the sophistication of opposing counsel and the court of appeals (are they likely to pick up the issue themselves or simply assume that independent review applies?), the case law in that jurisdiction (have the courts there already identified the issue?), and the importance of pressing the point to your prospects for success. Often, it will make tactical sense to assume that independent review applies in your opening brief, wait for your opponent to raise the issue, and deal with it in your reply brief if necessary.

RASSEL: I have argued for the broadest possible application of the independent appellate review doctrine. Starting from the premise that it is essential to protect all speech, I have contended that there is no logical way to differentiate the issue of, say falsity, from actual malice.

LDRC: *In addition to the scope of the issues to be independently reviewed, there remains* *the question of how deeply the appellate court should delve into the factfinding process as to each issue being reviewed. How much resistance have you found to any intrusion into the province of the jury and what have you found to be helpful in convincing appellate courts that the primary consideration is to assure that constitutional rights are not sacrificed by inappropriate deference to the trier of fact?*

ABRAMS: There is always resistance. The best argument, I think, is the most logical one: if the court is unprepared to review the factual data closely, what does the concept of independent review mean?

AXELRAD: Appellate courts, for the most part, first have a visceral reaction to the facts and, then, determine how much deference to give to the trier of fact. This notion is related to whether the plaintiff appears, on the face of the record, to have been "done wrong."

LEVINE: After *Connaughton*, and largely because of *Connaughton*, the courts have been all over the lot on this issue. Some courts have undertaken a very cramped review, much like that advocated by the Sixth Circuit in *Connaughton*; others have undertaken a searching, painstaking review, not unlike that advocated by the dissenting judge in *Connaughton* and by the D.C. Circuit in *Tavoulareas*. The Supreme Court has simply ducked much of the issue, which leaves the lower appellate courts significant freedom to take divergent paths in the short run. Nevertheless, *Connaughton, Bose, Sullivan*, and *St. Amant*, taken together with the better appellate decisions like *Tavoulareas* and *Newton*, give defense counsel plenty of ammunition to convince a court of appeals that (1) it must consider the *entire* record, including evidence favoring the defendant; (2) it must independently make the ultimate legal judgment about whether there is "clear and convincing" evidence of constitutional malice; and (3) it is not required to defer to every theory of the case concocted by the plaintiff that can arguably be labeled an "inference" from the historical facts presented at trial.

RASSEL: Appellate judges are divine people. If they become convinced that the speech you are defending is worthy of constitutional protection, they will have no trouble in exercising their divine right and intruding into the province of the jury under the guise of independent appellate review.

LDRC: Connaughton *expressly envisions some degree of deference to certain determinations by the trier of fact -- for example, regarding "credibility determinations" based on the "demeanor of the witnesses." Yet it is not clear from LDRC's study whether* Connaughton *has given sufficient guidance to courts applying independent appellate review in this regard. Has* Connaughton *complicated your efforts to achieve the deepest possible review or have you found* *ways to minimize or work around its effects?*

ABRAMS: With due deference to my colleague Lee Levine, I have generally found *Connaughton* distinguishable in light of the particularly distasteful (and unusual) facts found to exist in the case by the Supreme Court. Once distinguished, *Connaughton* is often helpful, since the facts in other cases are unlikely to be as troublesome.

AXELRAD: *Connaughton* has not complicated efforts to achieve the "deepest" possible review but it has affected achieving a favorable result. Under *Connaughton* the appellate courts may consider circumstantial evidence to determine whether the constitutional standard has been met.

LEVINE: *Connaughton* has not simplified matters, but I don't think it has complicated them either. The courts are as befuddled by independent review today as they were before *Connaughton* and indeed before *Bose*. An important and intelligent decision in the wake of *Bose,* like *Tavoulareas*, is followed by a disaster like the Sixth Circuit majority opinion in *Connaughton*. Similarly, an equally significant decision like *Newton,* rendered shortly after *Connaughton*, is followed by something like *Hinerman*. One thing, however, is clear, at least to me. No appellate court is ever going to say that it has the power to reconsider a jury's assessment of the credibility of witnesses. With respect to disputed issues of material fact, the appellate court will always give the benefit of the doubt, on the resolution of that specific issue of fact, to the jury's verdict.

RASSEL: If the court becomes convinced that the speech in question is worthy of constitutional protection, the courts seem to have no difficulty working around *Connaughton*'s tautologies.

LDRC: *In significant cases, losing defendants will almost always move for judgment n.o.v. or a new trial, and in some jurisdictions these motions may be a necessary prerequisite to taking an appeal. In some jurisdictions, any subsequent appeal is considered to be one from the grant or denial of the post-trial motions rather than from the underlying judgment. The traditional standard of review for such motions, namely to view all evidence and all reasonable inferences flowing therefrom in the light most favorable to the nonmovant, would appear to conflict with a searching review of constitutionally sensitive subjects. What arguments have you been able to use to convince courts that such deference to evidentiary findings is incompatible with and must yield to the command of independent appellate review?*

ABRAMS: Generally, I try to persuade district courts considering post-trial motions to apply the same independent review as appellate courts are obliged to provide. There is undeniable tension between the two principles articulated in the question: all one can do I think is to emphasize as much as possible that if traditional deference is paid to jury determinations, little will remain of independent review. On issues of pure credibility, that is a more difficult argument; on other issues, it is more powerful.

AXELRAD: In Maryland and District of Columbia state and federal courts, the appeal is not from the grant or denial of the j.n.o.v. so the standards do not conflict as in other jurisdictions.

LEVINE: The simple answer is *Bose*. If the deferential standard of review set forth in Rule 52(a), which is part of a set of rules (the Federal Rules of Civil Procedure) passed on by Congress, is overcome by the independent review mandated by the First Amendment, then there is no logical reason to treat other rules, federal or state, governing (for example) judgment n.o.v. differently.

RASSEL: I have argued that if the normal standards of review are at odds with the duty to independently review then the normal standards of review are constitutionally inapplicable.

LDRC: *In the course of the LDRC study, we have uncovered many decisions that, although perfunctorily citing* Bose *and the need for independent appellate review, are framed in terms of having uncovered "sufficient evidence" in the record for a jury to "reasonably" have found for the plaintiff. Has it been your experience that courts are paying lip service to independent appellate review while deferring increasingly to jury findings, particularly on "subsidiary issues" post-*Connaughton, *and what have you found to be effective in convincing them to frame their findings in terms of their own view of the evidence rather than on what a "reasonable" jury might have found?*

ABRAMS: Some judges simply do not accept any meaningful concept of independent review; at least a few of those repose upon the Supreme Court. To persuade recalcitrant judges, it is necessary to return to first principles -- those articulated in *Sullivan*, *Bose* and other useful cases.

AXELRAD: "We conclude that a jury could reasonably find that the statements in Flyer No. 3 conveyed false representations of fact sufficient to sustain this element of the defamation action." *Batson v. Shiflett*, 325 Md. 671, 602 A.2d 1191, 1213 (1992). As you can see, the Court of Appeals in *Batson*, in the appeal that I argued, did refer to what a "reasonable" jury "could" have found. Although I believe that the court did not entirely defer to the jury, the opinion also appears to say that "we've looked at it and the defendant was bad enough that we won't disturb the jury's verdict."

LEVINE: This is where I find that *Connaughton* can be especially helpful. The Court in *Connaughton* explicitly held that constitutional malice poses an issue of law to be decided by judges, not by finders of fact. This language ought to give most appellate courts comfort that this is ultimately their decision to make and that "deference" is neither necessary nor permissible. By the same token, there is no way to get around the fact that deference will be afforded to factfinders on the resolution of disputed issues of historical fact -- the kind of "subsidiary" issues with respect to which credibility determinations are crucial. Many appellate courts will feel more comfortable with independent review if you can explain that you are not asking them to override the jury's presumed resolution of such disputed issues of historical fact. Such a "concession," if you can call it that given the state of the law, will only work, of course, if there is sufficient evidence in the record beyond those facts in legitimate dispute to support an independent determination in the defendant's favor.

RASSEL: Intermediate Appellate Courts (particularly overworked in my jurisdiction) are more likely to give lip service to independent appellate review than the court of last appellate resort.

LDRC: *LDRC's study found that at least some courts have applied independent appellate review in cases involving private-figure plaintiffs and nonmedia defendants. Have you had occasion to argue for independent appellate review in cases involving nonmedia as well as media defendants and private as well as public figure plaintiffs? And have you found particularly persuasive arguments for extending independent appellate review to such cases?*

ABRAMS: No, I have not.

AXELRAD: In *Batson*, which was not a media case but involved a major labor union defendant, we persuaded the Maryland Court of Appeals to consider the plaintiff as a public figure and to accord independent appellate review to actual malice (and falsity). Unfortunately, the best we could secure, even under the heightened review standard, was a partial affirmance and partial remand and we therefore had to retry the case.

LEVINE: In most cases, you will have better luck convincing the court that the defamation does involve a matter of public concern. While this is often difficult in nonmedia cases, it is not impossible. We recently convinced a trial court, in a case alleging tortious interference with business relations against an insurance company, that the plaintiff doctor's surgical record was a matter of public concern, even though the alleged defamatory remarks (which allegedly interfered with his business) were all made in private conversations with his patients and others. I think it is a much tougher argument, after *Hepps* and *Greenmoss*, to convince a court that independent review applies to nonmedia libels involving matters of no public concern.

RASSEL: I have not had occasion to argue for independent review in a case involving a nonmedia defendant.

LDRC: *Given the obvious reluctance of some courts to "intrude" on the jury's traditional role as factfinder, and the -- at best -- ambivalent holding in* Connaughton, *is it your belief that independent appellate review currently retains its force as a means of insuring that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression?*

ABRAMS: Yes I do. At the least, it provides a blinking red light to judges warning them that they had better review this case carefully. At most, it's a lot more than that. In either event, it remains meaningful.

AXELRAD: Courts are going to give lip service to independent appellate review. Then, the appellate courts will decide the case in a basically result-oriented fashion. The media is not much loved in society and the courts are reflective of the society. Also, the courts have far more immediate problems than protecting the First Amendment.

LEVINE: Even in its most "stripped down" interpretation, independent review is a big help. Keep in mind, there is little question that cases like *Bose* would not have been reversed without independent review, and the kind of review undertaken in *Bose* was not particularly searching or intrusive. Nevertheless, the ultimate value of independent review will, in my judgment, be a function of how the courts resolve the issue of inferences. If the Supreme Court ultimately adopts the view championed by Judges Wright and Wald in *Tavoulareas* -- *i.e.*, that the constitutional obligation of independent review requires appellate courts to draw their own inferences from the historical facts in the record -- independent review will be a very potent weapon for reversing jury verdicts against the news media. If, on the other hand, the Supreme Court determines that any reasonable inference the jury "could have" drawn is binding on the appellate court, independent review will be of little practical value in most cases. This, of course, is the issue that the Court simply left unanswered in *Connaughton*.

RASSEL: I personally believe that independent appellate review is alive and well and does retain its force as a means of ensuring that forbidden intrusions on the field of free expression do not occur *when* the Appellate Court is convinced that the speech ought to be protected.

LDRC: *As practitioners in this area you are most finely attuned to the problems that inhere in convincing courts to reverse unfavorable judgments by whatever means necessary. Are there any final thoughts or observations that you would wish to share with* Bulletin *readers on the subject of independent appellate review?*

AXELRAD: The most important document in the appellate process is a superlative and eye-catching brief that encapsulates how the trial court was wrong. Also, the defendant and his counsel have to have some credibility in the appellate court or a plaintiff's verdict will be summarily affirmed.

LEVINE: Most of the discussion here has assumed that we are talking about an appeal from a general verdict in favor of the plaintiff. Indeed, most of the cases in which the courts have spoken to the issue of independent review, at least in the context of jury verdicts, have come either from general verdicts or from the most general kinds of special verdicts. One way to cabin the appellate court's ability to speculate about what the jury "must have" or "could have" found, including with respect to credibility determinations, is to advocate the use of much more detailed special verdicts in the trial court. If the jury is required to answer a specific question about its resolution of a disputed historical fact, appellate guesswork is eliminated and the appellate court can concentrate on the "ultimate" issue of whether those findings of historical fact add up to clear and convincing evidence of constitutional malice. This approach is not suited for every case (and it is more conducive to mistrials than a general verdict), but it can be useful if your case involves a host of disputed issues of historical fact.

RASSEL: Independent appellate review will remain an esoteric concept for appellate judges *if* they do not become convinced that the speech you are defending ought to be protected. If you succeed in "selling" the importance of the speech at issue to the Appellate Court, the Court will find a way of utilizing independent appellate review to reach a correct result.

LDRC: *Thank you all for taking the time to share your very valuable insights with LDRC* Bulletin *readers.*

VII. CASE LISTS

A1. Federal Cases from 5/84 through 6/89

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Lerman v. Flynt Distributing, 745 F.2d 123, 10 Med. L. Rptr. 2497 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)	Public figure (media)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	**Plaintiff status**: trial court erred in ruling that plaintiff was private figure. **Depth of independent appellate review**: court cites *Bose* but adds, *"[w]hile th[e] constitutional duty [of independent review] does not permit us to substitute our views for legitimate jury findings [citing Time v. Hill] it does require us to scrutinize the record closely."*
Mr. Chow v. Ste. Jour Azur, 759 F.2d 219, 11 Med. L. Rptr. 1713 (2d Cir. 1985)	Public figure (media)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	**Opinion**: trial court erred by failing to consider constitutional protection for statements of opinion.
Dalbec v. Gentleman's Companion, 828 F.2d 921, 14 Med. L. Rptr. 1705 (2d Cir. 1987)	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Gross irresponsibility**: jury finding of gross irresponsibility *"not irrational."* **Of and concerning**: evidence supported finding that statement was "of and concerning" plaintiff. **Size of award**: evidence supports and court will not disturb size of jury award.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Marcone v. Penthouse, 754 F.2d 1072, 11 Med. L. Rptr. 1577 (3d Cir.), *cert. denied*, 474 U.S. 864, *reh'g denied*, 474 U.S. 11014 (1985)	Public figure (media)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	**Plaintiff status**: trial court erred in treating plaintiff as private figure. **Jury instructions**: court erred in instructing jury that actual malice need be proven only by preponderance of evidence. **Evidence of actual malice**: rather than remand for new trial, court undertook independent review, holding that plaintiff failed to prove actual malice.
McDowell v. Paieworsky, 769 F.2d 942, 11 Med. L. Rptr. 2396 (3d Cir. 1985)	Public figure (nonmedia)	Jury award of compensatory damages	Reversed	Yes as to actual malice	**Plaintiff status**: trial court erred in ruling that plaintiff was private figure. **Evidence of actual malice**: rather than remand for new trial, and noting that jury's rejection of punitive damages could have been based on grounds other than insufficiency of evidence of actual malice, court undertook independent review, holding that plaintiff failed to prove actual malice.
Falwell v. Flynt, 797 F.2d 1270, 13 Med. L. Rptr. 1145 (4th Cir. 1986), *rev'd sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)	Public figure (media)	Jury award of compensatory and punitive damages for intentional infliction of emotional distress; jury verdict for defendant on defamation claim	Affirmed both appeal and cross-appeal	No as to defamation, unclear as to intentional infliction of emotional distress	**Defamation claim**: no independent appellate review of actual malice on plaintiff's appeal because not at issue in jury's determination that statement could not reasonably be understood as factual. **Unclear standard for review of emotional distress**: claim for intentional infliction of emotional distress receives *"same level of first amendment"* protection as defamation claim but "jury verdict" may be reversed *"only when there is a complete absence of facts to support [it]."*

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Levine v. CMP Publications, 738 F.2d 660, 10 Med. L. Rptr. 2337 (5th Cir. 1984) *continued on next page*	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed compensatory damages as to both articles and punitive damages as to second article. Reversed punitive damages as to first article.	Yes as to actual malice; no as to negligence and falsity	**Falsity**: jury finding of falsity not subject to independent appellate review (dissent would have found first article substantially true). **Fair report privilege**: not available for substantially untrue report. **Negligence**: "substantial evidence" to support jury finding of negligence (dissent would have applied independent appellate review and reversed).
Levine v. CMP Publications, continued					**Status of plaintiff**: court does not address whether trial judge erred in submitting question of plaintiff's status to jury because jury correctly concluded that plaintiff was private figure.
Bartimo v. Horseman's Benevolent and Protection Ass'n, 771 F.2d 894, 12 Med. L. Rptr. 1567 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986)	Public official (media)	Directed verdict after close of plaintiff's case based on insufficient evidence of actual malice	Affirmed	Yes as to actual malice	**"Two way street"**: court expressly rejects argument that independent appellate review required only when actual malice is found. **Depth of independent appellate review**: review limited to *"ultimate factual finding of the constitutionally mandated actual malice element"* and excludes *"the credibility findings of the district court and the subsidiary factual findings supporting the ultimate determination regarding actual malice."*
McKinley v. Baden, 777 F.2d 1017 (5th Cir. 1985)	Public official (nonmedia public official)	Bench award of compensatory damages	Reversed	Yes as to actual malice	**Depth of independent appellate review**: court *"respect[s] credibility choices"* made by trial court regarding witness demeanor, but nevertheless finds no clear and convincing evidence of actual malice.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Herceg v. Hustler, 814 F.2d 1017, 13 Med. L. Rptr. 2345 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988)	Private figure (media)	Jury award of compensatory and punitive damages for *incitement to lawless action*	Reversed	Yes as to incitement	**Rule 52**: court seems to suggest that Rule 52 and independent appellate review must be accommodated.
National Association of Government Employees v. National Federation of Federal Employees, 844 F.2d 216 (5th Cir. 1988)	Public figure (nonmedia)	Jury verdict for defendant	Affirmed	Yes as to actual malice	**"Two-way street"**: assumes without deciding that independent appellate review would apply to labor disputes as well as to disputes involving public officials and public figures; although court does not address whether independent appellate review should be extended to plaintiff's appeal, two-way street is implicit in its review of jury's determination that plaintiff failed to present clear and convincing evidence of actual malice. **Depth of independent appellate review**: *"evidence on both sides was testimonial, and much turned on the credibility of the witnesses, a matter on which, even after Bose, we must respect the jury's conclusions."* **Rule 11 sanctions**: abuse of discretion to impose sanctions. **Denial of new trial**: not an abuse of discretion.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 14 Med. L. Rptr. 2209 (6th Cir. 1988), *aff'd on other grounds*, 491 U.S. 657, 16 Med. L. Rptr. 1881 (1989)	Public figure (media)	Jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Depth of independent appellate review**: does *"not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but rather [is] limited to a review of the ultimate conclusion of clear and convincing evidence of actual malice"*). **Falsity**: jury findings not clearly erroneous. **Defamatory meaning**: jury findings not clearly erroneous.
Douglass v. Hustler Magazine Inc., 769 F.2d 1128, 11 Med. L. Rptr. 2264 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986)	Public figure (media)	Jury award of compensatory and punitive damages for invasion of privacy, with punitive damages remitted by trial court	Reversed and remanded	Not reached as to actual malice	**Jury instruction**: trial court failure to instruct jury that actual malice must be proven by clear and convincing evidence is reversible error, requiring remand. **False light**: *"reasonable jury could have found a false-light tort."* **Right of publicity**: jury *"did not exceed the bounds of reason"* in finding violation. **Evidentiary ruling**: prejudicial effect of expert testimony outweighed its probative value. **Size of award**: compensatory damage award was *"so excessive as to show that the jury must have been swept away by passion and prejudice."*

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 14 Med. L. Rptr. 1497 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988)	Public figure (media)	Jury award of compensatory and punitive damages	Affirmed punitive damages, reversed trial court's remittitur of compensatory damages	Yes as to actual malice and as to falsity/fair summary	**Depth of independent appellate review**: court expressly avoided deciding breadth of independent appellate review by reviewing *all* jury findings and finding clear and convincing evidence of actual malice. *Cf. Tavoulareas*, *infra*, p. A8. **Falsity/fair summary**: broadcast was not a fair summary (*note:* court declines to **Opinion**: as matter of law, statements were factual and not protected as opinion. **Size of punitive award**: not excessive,given net worth of network and broadcaster. **Size of compensatory award (plaintiff's cross-appeal)**: trial court erred in setting aside jury award; proof of actual damages is not required where plaintiff is entitled to recover presumed damages.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Bagley v. Iowa Beef Processors, 797 F.2d 632, 13 Med. L. Rptr. 1113 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987)	Private figure, public issue (nonmedia)	Jury award of compensatory and punitive damages for defamation and tortious interference with present and future employment	Reversed and remanded as to defamation, affirmed in part as to tortious interference	No as to tortious interference; not reached as to actual malice	**Burden of proof of falsity**: trial court erred in placing burden on defendant. **Plaintiff status:** trial court correct in treating plaintiff as private figure. **Actual malice**: remand obviates review of actual malice in connection with award of punitive damages. (Partial dissent would have treated plaintiff as public figure but also would have left determination of actual malice to remand.) **Tortious interference**: verdict *"not without substantial support"* and court *"in no position to second-guess the jury that heard and was in a position to weigh the competing evidence."* **Privileged communication**: "independent review," but absent controlling state law, court gives *"significant deference to a district court's resolution of unclear questions of state law."* **Petitioning**: trial court erred in concluding that defendant's activities did not involve constitutionally protected petitioning. **Nonmedia defendant**: entitled to same level of constitutional protection as media defendant.
Speer v. Ottaway Newspapers, 828 F.2d 475, 14 Med. L. Rptr. 1601 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988)	Public official (media)	Judgment n.o.v. jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Implied "two-way street"**: without discussing whether independent appellate review should be limited to defendant's appeals, appellate court implicitly adopts "two-way street" by independently reviewing trial court finding that actual malice was not proven by clear and convincing evidence.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Hardin v. Santa Fe Reporter, 745 F.2d 1323, 11 Med. L. Rptr. 1026 (10th Cir. 1984)	Public official (media)	Grant of defendant's motion to dismiss following trial on the merits	Affirmed	Yes as to actual malice but review limited by truncated record	**Implied "two-way street"**: without discussing whether independent appellate review should be limited to defendant's appeals, appellate court implicitly adopts "two-way street" by independently reviewing trial court finding that actual malice was not proven by clear and convincing evidence.
Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), *cert. denied*, 484 U.S. 856 (1987)	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed as to compensatory damages and remanded as to punitive damages	No as to actual malice, unclear as to negligence and falsity	**Jury instructions**: trial court erred in not distinguishing actual malice from common law malice for purposes of punitive damages award. **Independent review**: because of remand, court does not independently review the evidence (or mention *Bose*). **Negligence**: *"evidence sufficiently supported the jury's verdict."* **Falsity**: *"evidence sufficiently supported the jury's verdict."* **Personal jurisdiction**: trial court correctly found sufficient contacts to support exercise of personal jurisdiction. **Privileged communication**: trial court correctly found no privilege.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Tavoulareas v. Piro, 817 F.2d 762, 13 Med. L. Rptr. 2377 (D.C. Cir. 1987) *cert. denied*, 484 U.S. 870 (1987)	Public figure (media)	Panel opinion reversing trial court's judgment n.o.v. of jury award of compensatory and punitive damages	Reversed	No; court reviews under JNOV standard	**Depth of independent appellate review**: court states both positions ("*Under one view Bose's mandate of de novo review means precisely that, with no deference at all to be accorded any jury finding germane to actual malice. Under the contrary view, Bose does not alter the traditional rules governing the review of jury verdicts and thus judicial deference is constitutionally mandated to presumed jury findings of underlying facts, evaluations of credibility, and the drawing of inferences.*") but reviews (and reverses) under JNOV standard (*"consider[ing] all the evidence in the light most favorable to [plaintiff] and abstain[ing] from assessing the credibility of witnesses or weighing the evidence"*). *Note*: both concurrence and dissent contend that majority's review is actually more rigorous than permitted under JNOV standard and amounts to independent appellate review. **Plaintiff status**: trial court correctly categorized plaintiff as public figure.

A2. State Cases from 5/84 through 6/89

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Pemberton v. Birmingham News, 482 So.2d 257, 12 Med. L. Rptr. 1465 (Ala. 1985)	Public official (media)	Judgment n.o.v. jury award of compensatory damages	Affirmed	Yes as to actual malice	**Interplay of independent appellate review and JNOV standards of review:** *Bose* trumps judgment n.o.v. standard of review: *"review the record independently of trier of fact to determine not whether there was a scintilla of evidence, but whether there was clear and convincing evidence presented on the constitutional fact of actual malice in a defamation case." Cf. Sprague*, p. A18.
Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 724 P.2d 562, 13 Med. L. Rptr. 1282 (Ariz. 1986)	Public figure (media)	Jury award of compensatory damages	Reversed in part and remanded	Yes as to actual malice, but only to determine that remand for new trial is required	**Plaintiff status:** trial court erred in treating plaintiff as a private figure. **Depth of independent appellate review:** applying independent appellate review, but under summary judgment standard of *Anderson v. Liberty Lobby*, court finds that there is sufficient evidence from which jury on remand could find actual malice to be established by clear and convincing evidence (*"[i]nferences are for the finder of fact, unless only one inference may be drawn"*). Court distinguishes "review for sufficiency of the evidence after a factfinder has applied the actual malice standard" from situation in which trial court's legal error requires choice between remand and dismissal. *Note*: although the plaintiff unsuccessfully sought punitive damages, so record "presumably contains all the evidence plaintiff could muster on that issue," court remands. *Cf. Marcone*, p. A1; *McDowell*, p. A2.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Starkins v. Bateman, 724 P.2d 1206 (Ariz. Ct. App. 1987)	Public official (nonmedia public officials)	Jury awards of compensatory and punitive damages, with remittitur of punitive damages	Affirmed	Yes as to actual malice	**Depth of independent appellate review**: limited to "ultimate" facts *("reluctant to interpret Bose as requiring us to undertake a de novo review of the record to determine whether the underlying facts which support the verdict were established by clear and convincing evidence. An appellate court is not equipped to make such a review effectively, and to do so would entirely displace the function of the jury in defamation cases. Instead we have undertaken a complete and independent review of the trial record to determine whether the ultimate facts are clearly and convincingly sufficient to establish actual malice.")*
Morris v. Warner, 160 Ariz. 55, 770 P.2d 359 (Ariz. App. 1989)	Public figure (nonmedia)	Jury award of unspecified damages	Reversed and remanded for entry of judgment for defendant	Yes as to actual malice	**Issues subject to independent appellate review**: *"except as to the element of actual malice, our standard of review is to whether substantial evidence exists to support the jury's verdict."*
McCoy v. Hearst, 727 P.2d 711, 13 Med. L. Rptr. 2169 (Cal. 1986)	Public official (media)	Intermediate court affirmance of jury award	Reversed	Yes as to actual malice	**Depth of independent appellate review**: *"[appellate] court must independently review all the evidence ... of actual malice".*
McNair v. Worldwide Church of God, 197 Cal. App.3d 363, 242 Cal. Rptr. 823 (Cal. Ct. App. 1987)	Private figure (nonmedia) [intrachurch religious controversy])	Jury award of compensatory and punitive damages	Reversed and remanded	Yes as to actual malice	**Depth of independent appellate review**: despite noting that the record does not contain evidence of actual malice, court remands, possibly because verdict was based on erroneous jury instructions. **Free Exercise Clause**: clear and convincing evidence of actual malice prerequisite to recovery in suit in religious context.

APPEALS	**STATUS OF PLAINTIFF (DEFENDANT)**	**JUDGMENT APPEALED FROM**	**RESULT ON APPEAL**	**IAR APPLIED/ NOT APPLIED**	**OTHER LEGAL ISSUES ADDRESSED ON APPEAL**
Holbrook v. Casazza, 204 Conn. 336, 528 A.2d 774 (Conn. 1987), *cert. denied*, 484 U.S. 1006 (1988)	Public official (nonmedia)	Jury award of general, special, and exemplary damages	Affirmed	Yes as to actual malice	
Brown v. K.N.D. Corp., 7 Conn.App. 418, 509 A.2d 533, 12 Med. L. Rptr. 2201 (Conn. App. 1986)	Public official (media)	Trial court decision for defendant	Reversed as to liability and remanded for determination of damages	Yes as to actual malice	**Two-way street**: *"We conclude that this independent review does not depend, as the defendant contends, upon a finding by the trial court that the defendant's speech was not protected by the first amendment, that is where the trial court found actual malice to have been proven. This independent appellate review extends as well to the situation of this case where the trial court found that actual malice had not been proven."*
Brown v. K.N.D. Corp., 205 Conn. 8, 529 A.2d 1292, 14 Med. L. Rptr. 1757 (Conn. 1987)	Public official (media)	Intermediate appellate court reversal of trial court judgment for defendant	Reinstated trial court judgment for plaintiff (reversing appellate court)	No as to actual malice, because one-way street	**One-way street**: *"The purpose of independent review is to safeguard the right of free expression. Absent a finding of actual malice there is no liability imposed on a defendant for his exercise of that right and hence no incursion on the first amendment. When, therefore, after a full trial on the merits, there is a finding of no actual malice, we think the better reasoning dictates that appellate review of the trial court judgment should be limited to the clearly erroneous standard... (citing Bose and New York Times).*

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Ingber v. Ross, 479 A.2d 1256 (D.C. App. 1984)	Private figure (nonmedia)	Bench award of compensatory damages	Affirmed	Yes as to actual malice and as to common law malice	**Excessiveness of damages/award of costs:** trial court did not abuse discretion. **Qualified privilege** (to warn patient of incompetent colleague): overcome by showing of common law malice.
Miami Herald Publishing Co. v. Ane, 458 So.2d 239, 10 Med. L. Rptr. 2383 (Fla. 1984)	Private figure (media)	Intermediate appellate court affirmance of jury award of compensatory damages	Affirmed	Yes as to negligence and defamatory meaning (but see note)	**Depth of independent appellate review:** although purporting to apply independent appellate review, and citing *Bose*, court concludes *"we agree with the district court that there was sufficient evidence on both issues upon which the jury could have reasonably found for the plaintiff."*
Rabren v. Straigis, 498 So.2d 1362, 13 Med. L. Rptr. 2163 (Fla. Dist. Ct. App. 1986)	Private figure, public issue (nonmedia)	Jury award of compensatory and punitive damages	Reversed and remanded	No as to actual malice (erroneous jury instruction required remand)	**Jury instruction**: court erred in definition of actual malice required to obtain punitive damages. Court remands rather than conduct independent appellate review of actual malice. *Cf. Marcone*, p. A1.
Miller v. Woods, 180 Ga. App. 486, 349 S.E.2d 505 (Ga. App. 1986)	Public official (nonmedia)	Jury award of damages	Reversed	Yes as to actual malice	
Wanless v. Rothballer, 136 Ill.App.3d 321, 483 N.E.2d 899, 12 Med. L. Rptr. 1106 (Ill.App. 1986)	Public official (media)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	
Wanless v. Rothballer, 115 Ill.2d 158, 503 N.E.2d 316, 13 Med. L. Rptr. 1849 (Ill. 1986), *cert. denied*, 482 U.S. 929 (1987)	Public official (media)	Intermediate appellate court reversal of jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Depth of independent appellate review:**: does not extend to "discrete facts" (e.g., accuracy of news report) or credibility determinations, but extends to application of these to finding of actual malice.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Costello v. Capital Cities Communications, 153 Ill.App.3d 956, 505 N.E.2d 701 (Ill. App. 1987)	Public official (media)	Jury award of compensatory and punitive damages	Affirmed as to liability but remitted as to compensatory damages and reversed as to punitive damages	Yes as to actual malice (but see note)	**Independent appellate review**: although failing to cite *Bose*, court cites *New York Times* for national commitment to "uninhibited, robust, and wide open debate," and appears to have conducted an independent review: *"our consideration of th[e] evidence and proof compels us to [conclude] ... that the editorial before us is libelous per se and that it was indeed published with the requisite actual malice."* **Compensatory damages**: must bear reasonable relationship to harm suffered. **Innocent construction rule**: similar but preferred to opinion doctrine. **Punitive damages**: reversed on court's theory that they constitute double recovery when *"the factors that ordinarily justify an award of punitive damages are themselves the basic elements necessary to ... recover compensatory damages."*
Costello v. Capital Cities Communications, 125 Ill.2d 402, 532 N.E.2d 790, 15 Med. L. Rptr. 2407 (Ill. 1988)	Public official (media)	Jury award of compensatory and punitive damages, with punitive damages reversed and compensatory damages remitted	Reversed as to as to all damages	Yes as to actual malice	**Independent appellate review**: *"From our independent review of the evidence in the record, we conclude that the plaintiff failed to satisfy his burden of proving actual malice by clear and convincing evidence."*
Scripps v. Ball, 14 Med. L. Rptr. 1693 (Ky. Ct. App. 1987)	Public figure (media)	Jury award of compensatory damages	Reversed	Yes as to actual malice	*Note*: see subsequent appeal, *Ball v. Scripps, infra*, p. B6.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
J & C Inc. v. Combined Communications Corp. of Kentucky, 14 Med. L. Rptr. 1688, *modified*, 14 Med. L. Rptr. 2162 (Ky. Ct. App. 1987)	Public figure (media)	Jury award of unspecified damages for defamation and false light	Reversed and remanded	Yes as to actual malice	**Plaintiff status**: trial court erred in not treating plaintiff as public figure. **Depth of independent appellate review**: sufficient evidence of actual malice to get to jury. *Cf. Marcone, infra*, p. A1; *McDowell infra*, p. A2.
Tosti v. Ayik, 394 Mass. 482, 476 N.E.2d 928 (Mass. 1985)	Private figure, public issue (nonmedia [labor dispute])	Jury award of unspecified damages	Affirmed as to liability, remanded for new trial or remittitur	Unclear as to actual malice - see note	**Standard of review**: because defendant appeals from denial of motions for directed verdict, judgment n.o.v., or new trial, court modifies duty of independent appellate review as follows: *"If [on appellate review] the facts, considered in the light most favorable to the plaintiff, were sufficient for the jury to find clear and convincing evidence of the defendants' malice, then the judge properly denied the ... motions."* **Evidentiary rulings**: trial court did not abuse discretion with respect to admissibility of evidence and refusal of motion for mistrial. **Size of award**: case remanded for remittitur because award was clearly excessive.
McAvoy v. Shufrin, 401 Mass. 593, 518 N.E.2d 513, 14 Med. L. Rptr. 2298 (Mass. 1988)	Public official (nonmedia)	Jury award of unspecified damages	Affirmed	Yes as to actual malice	**Depth of independent appellate review**: does not extend to credibility determinations. **Falsity**: sufficient evidence existed to support jury finding of falsity. **Defamatory meaning**: sufficient evidence existed to support jury finding of defamatory meaning.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Locricchio v. Evening News Ass'n, 16 Med. L. Rptr. 1473 (Mich. Ct. App. 1989)	Private figure (media)	Trial court entry of directed verdict for defendant following jury award of actual damages	Reversed, reinstating jury award	No	**Standard of review:** court applies "law of the case" rather than independent appellate review. *Note*: Court of Appeals was later in turn reversed by Michigan Supreme Court. *See infra*, page B10.
Diesen v. Hessburg, 437 N.W.2d 705, 17 Med. L. Rptr. 1389 (Minn. App. 1989)	Public official (media)	Jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Depth of independent appellate review:** although *Bose* unclear as to amount of deference due to factfinder's credibility assessments, court finds trial record *"fully supports jury's verdict."*
Williams v. Pulitzer Broadcasting Co., 706 S.W.2d 508, 12 Med. L. Rptr. 1712 (Mo. App. 1986)	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed as to compensatory, reversed as to punitive damages	Unclear as to both actual malice and fair report	**Independent appellate review**: although court does not cite *Bose* on issue of independent appellate review, it concludes that *"evidence in the record does not clearly and convincingly show [either defendant] had serious doubts as to the truth of the material broadcast."* **Privilege for report of official proceeding:** without mentioning independent appellate review, appellate court reviews record and concludes that trial court did not err in refusing privilege when broadcast did not purport to be report of the proceeding. **Size of award**: supported by substantial evidence and not against the weight of the evidence.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Warner v. Kansas City Star Co., 726 S.W.2d 384, 13 Med. L. Rptr. 1961 (Mo. App. 1987)	Public figure (media)	Judgment n.o.v. of jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Depth of independent appellate review**: in judgment n.o.v., court defers not to jury but rather to trial court on credibility determinations. **"Two-way street"**: although court reviews record, it defers to trial court's finding of absence of clear and convincing evidence of actual malice. **Plaintiff status**: trial court correct in treating plaintiff as public figure.
Deaver v. Hinel, 233 Neb. 524, 391 N.W.2d 128, 13 Med. L. Rptr. 1219 (Neb. 1986)	Public official (media)	Jury award of unspecified damages	Reversed and remanded with directions to dismiss	Yes as to falsity and as to "of and concerning"	
Burke v. Deiner, 97 N.J. 465, 479 A.2d 393 (N.J. 1984)	Public official (nonmedia)	Intermediate appellate court affirmance of jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	**Actual malice**: independent appellate review was applied to actual malice to assess whether defendants lost qualified privilege rather than to determine liability.
Nellis v. Miller, 101 A.D.2d 1002, 477 N.Y.S.2d 72, 10 Med. L. Rptr. 1933 (N.Y. App. Div. 1984)	Public official (nonmedia public official)	Jury award of compensatory and punitive damages	Affirmed as to liability, reversed as to damages and remanded for new trial or remittitur	Unclear as to falsity and as to actual malice	**Standard of review**: without citing *Bose* or stating need to independently review record, court finds *"sufficient evidence was adduced at trial"* to support jury finding of falsity and actual malice but that size of award *"is without support in the record."*

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Mahoney v. Adirondack Publishing Co., 123 A.D.2d 10, 509 N.Y.S.2d 193, 13 Med. L. Rptr. 2061 (N.Y. App.Div. 1986)	Public figure (media)	Jury award of compensatory damages	Affirmed as to compensatory damages, reversed as to punitive damages	Yes as to actual malice	**Punitive damages**: not available absent showing of common law malice. **Actual malice**: can be inferred when defendant's eyewitness report of "events that speak for themselves" is contradicted by other eyewitnesses, whom jury credits. *Note*: Appellate Division was later reversed by New York Court of Appeals. *See Mahoney*, immediately below.
Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 523 N.Y.S.2d 480, 517 N.E.2d 1365, 14 Med. L. Rptr. 2200 (N.Y. 1987)	Public figure (media)	Intermediate appellate court affirmance of jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	**Falsity**: sufficient evidence to support jury finding. **Defamatory meaning**: sufficient evidence to support jury finding. **Actual malice**: cannot be inferred, even when other eyewitnesses, credited by jury, contradict defendant's "eyewitness" account of "events that speak for themselves," unless it is established that defendant "could not have misperceived those events."
Grau v. Kleinschmidt, 31 Ohio St.3d 84, 509 N.E.2d 399, 14 Med. L. Rptr. 1353 (Ohio 1987)	Public figure (media)	Intermediate appellate court reversal of trial court directed verdict for defendant	Reversed	Yes as to actual malice	**Standard of review for directed verdict**: *"court shall construe the evidence most strongly in favor of the party against whom the motion is directed in order to determine whether a reasonable jury could find ... actual malice with convincing clarity."*
Landsdowne v. Beacon Journal Publishing Co., 32 Ohio St.3d 176, 512 N.E.2d 979, 14 Med. L. Rptr. 1801 (Ohio 1987)	Private figure (media)	Intermediate appellate court affirmance of jury award of compensatory damages	Reversed and remanded	No as to negligence	**Breadth of independent appellate review**: not applied to the issue of negligence. **Burden of proof**: private-figure plaintiffs must prove negligence by clear and convincing evidence.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Landsdowne v. Beacon Journal Publishing Co., 1989 WL 11798 (Ohio App. 1989) (unpublished)	Private figure (media)	Jury award of compensatory damages, with defendant's motions for directed verdict and judgment n.o.v. denied	Affirmed	No	**Standard of review**: light most favorable to nonmovant; independent appellate review not applied to negligence. *See Landsdowne*, immediately above.
Sprague v. Walter, 357 Pa.Super. 570, 516 A.2d 706, 13 Med. L. Rptr. 1177 (Pa. Super. 1986) *continued on next page*	Public official (media)	Jury award of compensatory and punitive damages	Reversed and remanded	Yes as to actual malice, but combined with JNOV standard; see note	**Standard of review**: on appeal from a denial of judgment n.o.v., *"our task is to make an independent examination of the evidence adduced to determine if it was constitutionally sufficient to warrant a finding by the jury of actual malice, and in so doing, the evidence, together with all reasonable inferences therefrom, must be considered in the light most favorable to the verdict winner"* (quoting *Corabi*, a 1971 Pennsylvania decision). **Effect of judgment n.o.v.**: although court cites *Bose* as a footnote to above quotation, its review of the denial of the judgment n.o.v. appears to result in greater deference to jury findings; as the court noted, *"it was for the jury to decide whether the April 1-2 articles were written with reckless disregard."* **Note**: although above may be read as inconsistent with *Bose*, court claims to find support for its approach in *Time v. Hill*: *"where either result finds reasonable support in the record, it is for the jury, and not this Court, to determine whether there was knowing or reckless falsehood."*

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Sprague v. Walter, continued					**Falsity**: court has "no quarrel" with jury finding of falsity. **Shield law/evidentiary ruling**: trial court's error in directing jury to strike from consideration part of the evidence because of defendant's refusal to identify sources requires remand; thus discussion of actual malice becomes dictum.
Frisk v. News Company, 523 A.2d 347, 13 Med. L. Rptr. 1835 (Pa. Super. 1986), *appeal denied*, 515 Pa. 614, 530 A.2d 867 (Pa. 1987)	Public figure (media)	Jury award of compensatory and punitive damages, with defendant's motions for judgment n.o.v. denied	Affirmed	Yes as to actual malice (but see note)	**Depth of independent appellate review**: although court cites and appears to embrace *Bose*, its "independent" review occupies three short paragraphs, with first paragraph approvingly quoting from trial court opinion, second paragraph discussing falsity of one of the articles, and final paragraph *cursorily* concluding that the articles were "marked by clear departures from acceptable journalistic procedures." **Evidentiary ruling**: trial court did not abuse discretion to limit cross-examination of plaintiff's character witnesses. **Size of award**: compensatory damages not excessive and, after remittitur, neither were punitives.
Stickney v. Chester County Communications, Ltd., 522 A.2d 66, 13 Med. L. Rptr. 2192 (Pa. Super. 1987), *appeal denied*, 516 Pa. 643, 533 A.2d 713 (Pa. 1987)	Public official (media)	Jury award of compensatory and punitive damages, with defendant's judgment n.o.v. motion denied	Affirmed	Yes as to actual malice, but combined with JNOV standard; see note	**Standard of review**: court independently reviews record, but on appeal from denial of judgment n.o.v., evidence and all inferences must be considered in light most favorable to winner of verdict (*quoting Sprague*).

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Curran v. Philadelphia Newspapers, Inc., 376 Pa.Super. 508, 546 A.2d 639, 15 Med. L. Rptr. 1745 (Pa. Super. 1988)	Public official (media)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice but combined with JNOV standard (see note)	**Standard of review**: court independently reviews record, but on appeal from denial of judgment n.o.v., evidence and all inferences must be considered in light most favorable to winner of verdict (*quoting Sprague*). **Depth of independent appellate review**: although court recites requirement of independent appellate review, it *"review[s] the entire record with deference to the presumed jury findings of fact and without second guessing the jury on the credibility of witnesses."*
Martin v. Wilson Publishing Co., 497 A.2d 322, 12 Med. L. Rptr. 1049 (R.I. 1985)	Public figure (media)	Jury verdict for defendant	Reversed and remanded	Yes as to actual malice and as to plaintiff status	**"Two-way street"**: implied. **Plaintiff status**: ample evidence in record to support trial court's treatment of plaintiff as public figure. **Jury instruction**: trial court erred by submitting to jury only issue of whether rumors existed. Since rumors "were based upon the stretching of available facts and 'imaginations,'" there was a jury question as to whether publication was made with actual malice. **Neutral reportage/fair report**: available only if statements are accurately attributed to identified and responsible source.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Lyons v. Rhode Island Public Employees Council, 516 A.2d 1339 (R.I. 1986)	Public figure (nonmedia [labor dispute])	Jury verdict for defendant, plaintiff's motion for new trial denied	Judgment vacated, new trial granted	No	**Independent appellate review/witness credibility**: in trial in which credibility of witnesses was at issue, and trial court justice died before considering plaintiff's posttrial motions, it was abuse of discretion for successor judge to deny plaintiff's motion for new trial. Ironically, despite giving such weight to credibility determinations, and itself declining to independently review the record, on defendant's appeal from the retrial, *see Lyons*, immediately below, the same court independently reviewed the evidence and concluded that the article was neither false nor defamatory and was not published with actual malice.
Lyons v. Rhode Island Public Employees Council, 559 A.2d 130, 16 Med. L. Rptr. 1682 (R.I. 1989), *cert. denied*, 493 U.S. 892 (1989)	Public figure (nonmedia [labor dispute])	Jury award of compensatory and punitive damages, with defendant's motions for judgment n.o.v. or remittitur denied	Reversed	Yes as to actual malice, as to falsity, and as to defamatory meaning	*See Lyons*, immediately above.
Major v. Drapeau, 507 A.2d 938, 12 Med. L. Rptr. 2032 (R.I. 1986)	Public figure (nonmedia public officials)	Grant of new trial, following denial of directed verdict for defendant and jury award of unspecified damages	Reversed, with judgment for defendant entered	Yes as to actual malice and as to plaintiff status	**Standard of review for denial of directed verdict**: evidence viewed in light most favorable to nonmovant.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Beckham v. Sun News, 289 S.C. 28, 344 S.E.2d 603, 12 Med. L. Rptr. 2196 (S.C. 1986), *cert. denied*, 479 U.S. 1007 (1986)	Public official (media)	Jury award of compensatory and punitive damages	Reversed and remanded	Not reached because of remand on issue of law	**Jury instruction**: trial court erred in instructing jury that truth was a defense.
Doubleday v. Rogers, 674 S.W.2d 751, 10 Med. L. Rptr. 2173 (Tex. 1984)	Public official (media)	Intermediate appellate court reversal of trial court "take nothing" award following jury award of punitive without compensatory damages	Reversed	Yes as to actual malice	**Availability of punitive damages**: appellate court erred in reversing trial court's application of Texas law prohibiting award of punitive damages without compensatory damages.
Outlet v. International Security Group, 693 S.W.2d 621 (Ct. App. Tex. 1985)	Private figure (media)	Jury award of general, special, and exemplary damages	Affirmed on condition of remittitur	Yes as to actual malice	**Waiver of injury to reputation**: plaintiff's stipulation waiving damage to reputation as issue did not preclude recovery for mental anguish, humiliation, and embarrassment. **"Of and concerning"**: jury finding "amply supported." **Plaintiff status**: no evidence to support treatment of plaintiff as public figure. **Falsity**: jury finding of falsity supported by evidence. **Negligence**: court "reviews" the evidence, but makes no mention of heightened review until it reaches issue of actual malice.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Breen v. DeLord, 723 S.W.2d 166 (Tex. Ct. App. 1986)	Public official (nonmedia)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice (see note)	**Standard of review**: although not citing *Bose* for requirement of independent appellate review, court undertakes complete review, and cites *Bose* for proposition that jury's failure to believe defendant's testimony as to knowledge of falsity of statement is insufficient, standing alone, to establish actual malice.
Gazette Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713, 11 Med. L. Rptr. 1609 (Va. 1985)	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed as to compensatory damages, reversed as to punitive damages	Yes as to actual malice; no as to negligence	**Note**: *Gazette* decided four consolidated appeals - *see also Charlottesville Newspapers, Inc., Matthews, Port Packet Corporation*, and *Fleming*, immediately below. **Depth of independent appellate review**: does not extend to credibility determinations or require court to discount *"presumption of correctness that attaches to factual findings."* **Actual malice**: independent appellate review reveals insufficient evidence of actual malice to support punitive damage award. **Fault**: in action brought by private individual, regardless of whether speech is on private or public issue, negligence standard applies if defamatory statement makes substantial danger to reputation apparent; if danger is not apparent, actual malice standard applies. **Negligence**: independent appellate review not applied to negligence.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Charlottesville Newspapers, Inc. v. Matthews, 229 Va. 1, 325 S.E.2d 713, 11 Med. L. Rptr. 1609 (Va. 1985)	Private figure (media)	Jury award of compensatory damages	Affirmed	No	**Defamatory meaning**: article was sufficiently defamatory on its face to submit to jury. **Fair report/substantial truth**: *"We hold that the defamatory words, as a matter of law, were not substantially accurate."* **Negligence**: not reviewed because not raised in trial court (although in dictum court finds "abundant" evidence of negligence).
Port Packet Corporation v. Lewis, 229 Va. 1, 325 S.E.2d 713, 11 Med. L. Rptr. 1609 (Va. 1985)	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed as to compensatory damages, reversed as to punitive damages	Yes as to actual malice; no as to negligence	**Actual malice**: independent appellate review reveals insufficient evidence of actual malice to support punitive damage award. **"Of and concerning"**: sufficient evidence in the record for jury to have concluded article was "of and concerning" plaintiffs. **Negligence**: sufficient evidence in the record for jury to have concluded defendants were negligent. **Size of award**: not clearly excessive, and there was sufficient evidence to support conclusion that plaintiffs' standing in community was impaired by publication.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Fleming v. Bedford, 229 Va. 1, 325 S.E.2d 713, 11 Med. L. Rptr. 1609 (Va. 1985)	Private figure (nonmedia)	Jury award of compensatory and punitive damages	Affirmed as to liability for compensatory and punitive damages, reversed and remanded as to size of both awards, with directions for plaintiff to "remit a substantial part" or submit to new trial on issue of damages	Yes as to actual malice and as to size of punitive damage award; no as to negligence	**Defendant status**: nonmedia defendant entitled to same level of protection under *Gertz* as media defendant. **Actual malice**: independent appellate review reveals clear and convincing evidence of actual malice. **Size of punitive damage award**: on independent appellate review, court concludes that *"amount of this award, including the interest factor, constitutes a forbidden intrusion on the exercise of free expression."* **Negligence**: independent appellate review does not apply to issue of negligence (court does not review record at all as to negligence, although negligence would appear to be encompassed in finding of actual malice). **Size of compensatory damage award**: bears no reasonable relation to damages and is not supported by evidence.
Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 334 S.E.2d 846, 12 Med. L. Rptr. 1100 (Va. 1985)	Private figure (nonmedia)	Jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Punitive damages**: although not required by constitutional law, in private/nonmedia case, punitive damages are not available under Virginia law without clear and convincing evidence of actual malice. **Size of award**: neither the compensatory nor the punitive damage award was clearly excessive.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Richmond Newspapers v. Lipscomb, 362 S.E.2d 32, 14 Med. L. Rptr. 1953 (Va. 1987), *cert. denied*, 486 U.S. 1023 (1988)	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed as to compensatory damages, reversed as to punitive damages	Yes as to actual malice	**Plaintiff status**: trial court erred in treating plaintiff as public figure. **Negligence**: jury not presented with issue because of erroneous treatment of plaintiff as public figure; court finds that negligence was subsumed in jury finding of actual malice, and that there was sufficient evidence to support finding of negligence, but that there was insufficient evidence of actual malice to support punitive damage award.

B1. Federal Cases from 7/89 to 1/94

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Weldy v. Piedmont Airlines, 985 F.2d 57 (2d Cir. 1993)	Private figure, private issue (nonmedia)	Judgment for defendant as matter of law following close of plaintiff's case for slander	Reversed and remanded	No	**Standard of review**: all evidence and all reasonable inferences flowing therefrom viewed in light most favorable to plaintiff (against whom trial court had granted judgment as a matter of law). **Qualified privilege**: defeated under New York law by a showing of either constitutional or common law malice. **Malice**: sufficient evidence in the record for jury to have found clear and convincing evidence that defendant had acted at least with reckless disregard for truth of statement. **Burden of proof of malice**: court concludes that although New York state law had yet to consider standard of proof in private-private situation, it would be unlikely to be more protective of defendants in such instances than in private-public situation, which requires plaintiff to prove malice only by preponderance.
Reuber v. Food Chemical News, Inc., 925 F.2d 703, 18 Med. L. Rptr. 1689 (4th Cir. 1991), *cert. denied*, 111 S.Ct. 2814 (1991) *continued on next page*	Public figure (media)	Jury award of compensatory and punitive damages for defamation and invasion of privacy	Reversed and remanded for entry of judgment for defendant	Yes as to actual malice	**Jury instruction**: trial court erred in instruction as to actual malice. Retrial unnecessary because court, reviewing record, finds no clear and convincing evidence of actual malice.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Reuber v. Food Chemical News, Inc., continued					**Depth of independent appellate review:** *"this standard of review does not transform an appellate court into a super-jury, nor does it give us free reign to revisit credibility determinations or to redetermine findings of historical fact."* **Plaintiff status**: matter of law. **Fair report**: confers qualified privilege to reprint letter of reprimand. **Invasion of privacy**: reversed because letter was on issue of legitimate public concern, was not published in a highly offensive way, and contents had been previously circulated.
Brown v. Petrolite Corporation, 965 F.2d 38 (5th Cir. 1992)	Private figure (nonmedia)	Jury award of compensatory and exemplary damages for both plaintiffs	Affirmed in part, reversed in part, remanded in part	Yes as to actual malice	**Actual malice**: record contains clear and convincing evidence of actual malice. **Depth of independent appellate review**: limited to *"ultimate factual finding of the constitutionally mandated actual malice element"* and excludes *"questions of credibility."* **Falsity**: sufficient evidence for jury to have found falsity. **Negligence**: *substantial evidence to support* jury finding of negligence. **Size of compensatory award**: reasonable in light of evidence. **Size of punitive award**: must bear a reasonable relationship to actual damages (reversing exemplary award of $300,000 as compared to $1 in compensatory damages). **Injunction**: remand to narrow trial court's overly broad injunction restricting defendant's future speech.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Bowling v. The Missionary Servants of the Most Holy Trinity, 972 F.2d 346, 20 Med. L. Rptr. 1496 (6th Cir. 1992)	Private figure (nonmedia [religious organization])	Plaintiff appeals from trial court award of compensatory, but denial of punitive, damages for invasion of privacy and outrageous conduct	Affirmed	No	**Outrageous conduct**: court finds no "outrageous conduct" because record reveals no evidence of severe emotional distress. **Invasion of privacy**: plaintiff was adequately compensated for appropriation of likeness by award equivalent to cost of commercial model.
Brooks v. American Broadcasting Companies, 999 F.2d 167, 21 Med. L. Rptr. 1756 (6th Cir. 1993)	Private figure (media)	Trial court's grant of directed verdict following close of plaintiff's evidence	Affirmed	No	**Standard of review**: in motion for directed verdict, court views evidence in light most favorable to appellant. **Negligence**: no evidence of negligence.
Bressler v. Fortune Magazine, 971 F.2d 1226, 20 Med. L. Rptr. 1873 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 1416 (1993)	Public official (media)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	**Depth of independent appellate review:** *"Although credibility determinations are reviewed under the clearly-erroneous standard ... the reviewing court must examine for [itself] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect" (quoting Connaughton).*
People's Bank and Trust Co. v. Globe International Publishing Co., 978 F.2d 1065, 20 Med. L. Rptr. 1925 (8th Cir. 1992), *cert. denied*, 114 S.Ct. 343 (1993)	Private figure (media)	Jury award of compensatory and punitive damages	Affirmed as to liability and as to punitive damages, remanded for remittance of compensatory damages	Yes as to actual malice	**Size of award**: "shockingly inflated" compensatory award remanded for substantial remittitur.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Newton v. National Broadcasting Co., Inc., 913 F.2d 652, 18 Med. L. Rptr. 1001 (9th Cir. 1990), *modified on denial of reh'g en banc*, 930 F.2d 662 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 192 (1991)	Public figure (media)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	**Depth of independent appellate review:** *"Under the rule of independent review, we may accept all the purely factual findings of the district court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence [of actual malice] ... Although the clearly erroneous standard of Rule 52(a) requires us to defer to the jury's or trial court's factual findings, 'the presumption of correctness ... is stronger in some cases than in others' ... [It] carries its maximum weight when we review findings of fact that turn on credibility determinations ... [but] applies with less force when a factfinder's findings rely on its weighing of evidence and drawing of inferences. ... But even when we accord credibility determinations the special deference to which they are entitled, we must nevertheless 'examine for ourselves' the factual record in full."*
Braun v. Soldier of Fortune Magazine, 968 F.2d 1110, 20 Med. L. Rptr. 1777 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1028 (1993)	Private figure (media)	Jury award of compensatory and punitive damages for negligent publication	Affirmed	Yes as to risk posed by advertisement (modified negligence standard)	**Modified negligence standard**: whether "on its face," advertisement would have alerted reasonably prudent publisher that it imposed an unreasonable risk. **Actual malice**: not reviewed because of defendant's failure to raise issue in its initial brief.

B2. State Cases from 7/89 to 1/94

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Dodson v. Dicker, 306 Ark. 108, 812 S.W.2d 97, 19 Med. L. Rptr. 1124 (Ark. 1991)	Private figure, public issue (nonmedia)	Jury award of compensatory and punitive damages for defamation and invasion of privacy, with defendant's motion for directed verdict denied	Reversed	Yes as to defamatory meaning/opinion (defamation claim) and as to actual malice (invasion of privacy claim)	**Actual malice**: *"We have exercised our independent judgment on this issue and conclude that a finding of libel would constitute a forbidden intrusion on free expression because the words involved are not capable of sustaining a defamatory meaning."*
Fuller v. Russell, 311 Ark. 108, 842 S.W.2d 12, 21 Med. L. Rptr. 1254 (Ark. 1992)	Public figure (nonmedia)	Jury award of compensatory and punitive damages	Reversed	Yes as to actual malice	
Carney v. Santa Cruz Women Against Rape, 221 Cal.App.3d 1009, 271 Cal.Rptr. 30, 18 Med. L. Rptr. 1123 (Cal. Ct. App. 1990)	Private figure (media)	Jury award of compensatory and punitive damages	Reversed and remanded	No	**Jury instruction**: trial court committed reversal error by failing to charge jury that negligence is an element of libel and that actual malice is required for the imposition of punitive damages in private figure cases involving matters of public concern.
Keohane v. Wilkerson, 859 P.2d 291, 21 Med. L. Rptr. 1417 (Co. Ct. App. 1993)	Public figure (media, nonmedia public official and private individual)	Jury award of compensatory and punitive damages	Reversed as to libel, affirmed as to slander	Yes as to opinion	**Size of award**: not "grossly and manifestly excessive."

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Ellerbee v. Mills, 262 Ga. 516, 422 S.E.2d 539 (Ga. 1992), *cert. denied*, 113 S.Ct. 1833 (1993)	Private figure (nonmedia)	Jury award of unspecified damages and injunction	Reversed as to injunction, affirmed as to damages	No	**Plaintiff status**: trial court correct in treating plaintiff as private figure. **Independent appellate review**: court's "review" consists of single sentence: *"Because [plaintiff] is neither a public official nor a public figure, we affirm the judgment based on the jury's verdict for damages and attorneys' fees."* Concurrence would treat plaintiff (school principal) as public official, but on independent review of record finds clear and convincing evidence of actual malice to support jury verdict on damages.
Henrichs v. Pivarnik, 588 N.E.2d 537, 20 Med. L. Rptr. 1787 (Ind. Ct. App. 1992)	Public official (media)	Jury award of punitive damages	Affirmed	Yes as to actual malice (but see note)	**Actual malice**: court does not cite need for independent appellate review of actual malice but provides *de novo* review of trial court's grant of summary judgment for plaintiff, finding clear and convincing evidence of actual malice to have been established by defendant's failure to respond to plaintiff's requests for admission, which resulted in conclusive admission that he knew article was false when published. **Damages**: absence of compensatory damages is not a bar to award of punitive damages where plaintiff establishes defamation per se.
Ball v. E.W. Scripps, 801 S.W.2d 684, 18 Med. L. Rptr. 1545 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991) *continued on next page*	Public official (media)	Intermediate appellate court reversal of jury award of compensatory damages	Reversed, reinstating jury award	Yes as to actual malice	*Note*: see prior appeal, *Scripps v. Ball, supra*, p. A13. **Depth of independent appellate review**: although court admits *"not absolutely clear in the* Connaughton *case that the majority on the United States Supreme Court fully*

APPEALS	**STATUS OF PLAINTIFF (DEFENDANT)**	**JUDGMENT APPEALED FROM**	**RESULT ON APPEAL**	**IAR APPLIED/ NOT APPLIED**	**OTHER LEGAL ISSUES ADDRESSED ON APPEAL**
Ball v. E.W. Scripps, continued					*embraced the view taken in the Sixth Circuit Court of Appeals that a reviewing court should defer to all 'subsidiary facts that the jury "could have" found,'"* it suggests that because Scalia's concurrence, requiring adoption of clearly erroneous standard as to *"all underlying, subsidiary or historical facts,"* was approved by three other justices, the Supreme Court and Sixth Circuit positions *"seem[] nearly coexistent."* **Fact/opinion**: statements can be fairly characterized as fact. **Jury instructions**: trial court correct in refusing to submit lengthy list of interrogatories.
Lovett v. Caddo Citizen, 584 So.2d 1197, 19 Med. L. Rptr. 1670 (La. Ct. App. 1991)	Private figure (media)	Jury award of unspecified damages	Reversed	Not reached because judgment reversed as matter of law	**Negligence**: newspaper entitled to rely on arrest information from an authorized police source.
Hines v. Arkansas Louisiana Gas Co., 613 So.2d 646 (La. Ct. App. 1993), *writ denied*, 617 So.2d 932 (La. 1993)	Private figure (nonmedia individuals and company [reports of sexual harassment])	Jury award of general damages for defamation and invasion of privacy	Reversed	Yes as to malice and as to falsity (but not constitutionally mandated - see note)	**Evidentiary ruling**: trial court erred in admitting into evidence plaintiff's offer to take a lie detector test. **Independent appellate review**: mandated because jury findings tainted by evidentiary error; court does not cite *Bose*. **Privilege**: statements made by employer during course of investigation into employee misconduct are privileged. **Invasion of privacy**: statements protected by employer's qualified privilege do not give rise to action for invasion of privacy.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Batson v. Shiflett, 86 Md.App. 340, 586 A.2d 792 (Md. Ct. Spec. App. 1991)	Public figure (nonmedia [labor dispute])	Jury award of compensatory and punitive damages for defamation and intentional infliction of emotional distress	Affirmed	No	**Defamatory meaning**: sufficient evidence in record to find statement defamatory. **Size of award**: not so excessive as to require a new trial.
Batson v. Shiflett, 325 Md. 684, 602 A.2d 1191 (Md. Ct. App. 1992)	Public figure (nonmedia [labor dispute])	Intermediate appellate court affirmance of jury award of compensatory and punitive damages for defamation and intentional infliction of emotional distress	Affirmed as to defamation, reversed as to intentional infliction of emotional distress, and remanded for new trial on defamation damages only	Yes as to actual malice and as to falsity (but see note)	**Actual malice**: *"evidence sufficient for the jury's finding"* of actual malice. **Falsity**: although court undertakes "independent examination of the whole record," rather than independently evaluating falsity, it concludes that jury could reasonably have found that flier was substantially untrue. **Defamatory meaning**: statements are capable of defamatory meaning. **Fair report of legal proceedings**: fairness and accuracy of report is a jury question. **Intentional infliction of emotional distress**: defamation alone insufficient to constitute "extreme and outrageous" conduct. **Opinion**: statements unprotected as opinion. **Jury instruction**: erroneous instruction on conditional privilege was harmless error.
Medical Mutual Liability Ins. Soc. v. Dixon Evander & Assoc., 92 Md.App. 551, 609 A.2d 353 (Md. Ct. App. 1992), *cert. denied*, 328 Md. 447, 614 A.2d 973 (Md. 1992) *continued on next page*	Private figure (nonmedia)	Jury award of compensatory and punitive damages for tortious interference with business relationship; mistrial as to defamation	Remanded as to punitive damages; judgment otherwise affirmed	Yes as to actual malice and as to falsity (but see note)	**Falsity**: as in *Batson, supra,* court recites need for independent appellate review but bases decision on fact that *"jury could reasonably have found"* falsity. **Actual malice**: jury *"could have concluded that there was clear and convincing evidence [of actual malice]."*

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Medical Mutual Liability Ins. Soc. v. Dixon Evander & Assoc., continued					**Size of punitive damage award**: remanded because trial court's posttrial review of size of damages was constitutionally inadequate.
Draghetti v. Chmielewski, 416 Mass. 808, 22 Med. L. Rptr. 1456 (Mass. 1994)	Private (nonmedia)	Jury award of damages for defamation and interference with business and contractual relations	Affirmed	No	**Plaintiff status**: court refuses to address because defendant did not raise issue below. **Standard of review**: on denial of directed verdict and motions for new trial, court reviews evidence in light most favorable to plaintiff; IAR applies only to cases involving actual malice. **Defamatory meaning**: sufficient evidence for jury to have concluded statements were susceptible to defamatory meaning. **Size of award**: no clear error. **Qualified privilege**: trial court correct not to issue jury instruction as to actual malice. **Common law malice**: sufficient evidence to show defendant motivated by ill will.
Michigan Microtech Inc. v. Federated Publications, Inc., 187 Mich.App. 178, 466 N.W.2d 717, 18 Med. L. Rptr. 2131 (Mich. Ct. App. 1991)	Private figure (media)	Jury award of compensatory damages, with defendant's motion for judgment n.o.v. denied	Affirmed	No as to negligence	**Plaintiff status**: trial court did not err in treating plaintiff as private figure. **Negligence**: there was sufficient evidence of negligence to go the jury. **Standard of review for directed verdict and judgment n.o.v.**: trial court's rulings will not be disturbed absent abuse of discretion.
Dannis v. C & G Publishing Inc., 468 N.W.2d 331, 18 Med. L. Rptr. 2271 (Mich. Ct. App. 1991)	Public figure (media)	Trial court's setting aside of jury verdict for plaintiff	Affirmed	No	**Actual malice**: no error in trial court finding of absence of actual malice. **Fair report**: *"any rational interpretation of a public document is a sufficient defense, as a matter of law, to a suit for defamation."*

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Locricchio v. Evening News Ass'n, 438 Mich. 84, 476 N.W.2d 112, 20 Med. L. Rptr. 1065 (Mich. 1991), *cert. denied*, 112 S.Ct. 1267 (1992)	Private figure (media)	Intermediate appellate court reinstatement of jury award of actual damages	Reversed	Yes as to falsity	*Note*: see prior decision, *supra*, p. A15. **Standard of review**: *"in a libel case affecting constitutionally protected public discourse, the law of the case doctrine should not have precluded a second review by a subsequent Court of Appeals panel. Indeed in such cases the law of the case doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts."* **Falsity**: *"we ... conclude that an independent appellate review with regard to falsity in private-figure, public-interest cases deters 'forbidden intrusion on the field of free expression' as a logical corollary to independent review of actual malice."* **Libel by implication**: not so analytically distinct from defamation by false facts *"as to require departure from the guiding principles of general libel and First Amendment libel law ... [namely:] ... speech on public matters initiates heightened First Amendment protection, true speech on public affairs cannot accrue liability, and a plaintiff bears the burden of proving falsity."*
Rouch v. Enquirer & News of Battle Creek, 184 Mich.App. 19, 457 N.W.2d 74, 17 Med. L. Rptr. 2305 (Mich. Ct. App. 1990)	Private figure (media)	Jury award of compensatory damages	Affirmed	No	**Falsity**: no error in trial court finding that plaintiff had proven falsity as matter of law. **Negligence**: sufficient evidence for jury to find defendant negligent.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Rouch v. Enquirer & New of Battle Creek Michigan, 440 Mich. 238, 487 N.W.2d 205, 20 Med. L. Rptr. 2265 (Mich. 1992)	Private figure (media)	Intermediate appellate court affirmance of jury award of compensatory damages	Reversed	Yes as to falsity	**Falsity/substantial truth**: article was substantially true, despite minor inaccuracy in suggestion that plaintiff had been identified by his children, rather than by the children of his former wife. **Material falsity**: misuse of formal legal terminology (charged versus accused) does not constitute material falsity.
Diesen v. Hessburg, 455 N.W.2d 446, 17 Med. L. Rptr. 1849 (Minn. 1990), *cert. denied*, 489 U.S. 1119 (1991)	Public official (media)	Intermediate appellate court reversal of trial court grant of defendant's motion for judgment n.o.v.	Reversed	Yes as to actual malice, as to opinion, and as to falsity	**Depth of independent appellate review**: *"[a]lthough credibility determinations are reviewed under clearly erroneous standard ... the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect" (quoting Connaughton).* **Libel by implication/opinion/falsity**: after conducting independent review of the record, court concludes *"[b]ecause ... articles contained only true statements or opinion, and any implication therefrom was constitutionally protected criticism of a public official, there was no defamatory 'speech' as a matter of law."*
Covey v. Detroit Lakes Publishing Co., 490 N.W.2d 138, 20 Med. L. Rptr. 1671 (Minn. Ct. App. 1992)	Private figure (media)	Dismissal of jury award of unspecified damages for libel and grants of summary judgment or directed verdict on related claims	Affirmed	No	**"Of and concerning"**: court finds competent evidence in record to sustain jury verdict that article was not "of and concerning" plaintiff. Trial court did not err in refusing to enter jury verdict on negligent defamation.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Meridian Star, Inc. v. Williams, 549 So.2d 1332, 16 Med. L. Rptr. 2446 (Miss. 1989)	Public official (media)	Jury award of unspecified damages	Reversed	Yes as to actual malice	**Actual malice**: articles were either true, or, having been obtained from reliable sources, believed by writer to be true. **Opinion (pre-*Milkovich*)**: *"[e]xpressions of opinion, however, unreasonable or vituperative, cannot be the subject of a defamation suit."*
Prozeralik v. Capital Cities Communications, Inc., 188 A.D.2d 178, 593 N.Y.S.2d 662, 21 Med. L. Rptr. 1073 (N.Y. App. Div. 1993)	Public figure (media)	Jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	*Note*: judgment reversed by New York Court of Appeals, *see* immediately below. **Size of compensatory award**: *"jury's award represents reasonable compensation for humiliation, mental anguish and injury to plaintiff's reputation."* **Size of punitive award**: *"in our view, 10 million dollars represents an appropriate amount to deter defendant, a multibillion dollar enterprise, from repeating its reckless conduct."* **Constitutionality of punitive damages**: Where actual malice has been shown by clear and convincing evidence, award of punitive damages does not violate state or federal constitutions.
Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 466, 605 N.Y.S.2d 218, 21 Med. L. Rptr. 2257 (N.Y. 1993) *continued on next page*	Public figure (media)	Intermediate court affirmance of jury award of compensatory and punitive damages	Reversed and remanded for new trial	Yes as to actual malice	**Actual malice**: court finds clear and convincing evidence of actual malice but reverses on erroneous jury instruction. **Jury instruction**: trial court erred in instructing jury that defendant's retraction was false as a matter of law, thus withdrawing factfinding function from jury.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Prozeralik v. Capital Cities Communications, Inc., continued					**Depth of independent appellate review:** *"This heightened review responsibility does not preclude consideration of all of the factual record in full, including 'circumstantial evidence' and evidence of the defendant's motive, and the findings of the fact finder. Rather, our review of the Appellate Division's analysis of the trial evidence necessarily encompasses all of these usual factors. We must be sure 'undue weight' was not given to the jury's findings in the usual mode and must be satisfied that an independent review' was conducted."* **Punitive damages**: to recover punitive damages, defendant must show common law malice. **Concurrence**: independent review reveals insufficient evidence of actual malice -- FBI agent's contradiction of broadcaster's account of their conversation is not clear and convincing evidence of actual malice, and broadcaster was not required to contact rival TV station for name of beating victim because it did contact FBI, presumably the best source of this information.
Dale v. Ohio Civil Service Employees Ass'n, 1989 WL 112337 (Ohio App. 1989) (unpublished)	Private figure (nonmedia [labor dispute])	Jury award of nominal and punitive damages	Affirmed	No as to actual malice and as to falsity	**Plaintiff status**: trial court correct in treating plaintiff as private figure. **Standard of review**: independent appellate review not required in private figure-nonmedia defendant case. **Actual malice**: sufficient evidence to substantiate jury's finding. **Falsity**: sufficient evidence to substantiate jury's finding.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Dale v. Ohio Civil Service Employees Ass'n, 57 Ohio St.3d 112, 567 N.E.2d 253 (Ohio 1991), *cert. denied*, 111 S.Ct. 2853 (1991)	Private figure (nonmedia [labor dispute])	Intermediate court affirmance of jury award of nominal and punitive damages	Reversed	Yes as to actual malice	**Actual malice**: actual malice standard applies to private-sector labor disputes. **Falsity**: plaintiff presented sufficient evidence to support a finding of falsity.
Fitzpatrick v. Philadelphia Newspapers, Inc., 389 Pa.Super. 438, 567 A.2d 684, 17 Med. L. Rptr. 1210 (Pa. Super. 1989)	Public official (media)	Jury verdict for defendant	Affirmed	Yes as to actual malice	**"Two-way street"**: court reviews trial record for evidence of actual malice so as to avoid "unnecessary and futile gesture" of granting new trial based on plaintiff's other assertions of error when there was insufficient evidence of actual malice.
Oweida v. The Tribune-Review Publishing Co., 599 A.2d 230, 19 Med. L. Rptr. 1801 (Pa. Super.Ct. 1991), *appeal denied*, 529 Pa. 670, 605 A.2d 334 (Pa. 1992)	Private figure (media)	Jury award of compensatory and punitive damages, with defendant's motion for judgment n.o.v. denied	Reversed as to punitive damages and remanded for retrial of compensatory damages	Yes as to actual malice	**Jury instructions**: failure to mention applicability of fair report privilege requires remand for new trial on compensatory damages; trial court also erred in instructing jury that actual malice can be proved based alone on "clear departures from accepted journalistic procedures," but as appellate court finds no evidence of actual malice in the record, remand of punitive damages claim is unnecessary. **Standard of review for judgment n.o.v.**: granting nonmovant benefit of all inferences reasonably drawn from evidence does not prevent court from conducting independent review of actual malice, however.
Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 427 S.E.2d 370, 21 Med. L. Rptr. 1124 (Va. 1993)	Private figure (media)	Jury award of presumed and punitive damages	Reversed	Yes as to actual malice	**Jury instructions**: error in instruction that presumed damages were available to private plaintiff on mere showing of negligence (actual malice required).

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Ingles v. Dively, 246 Va. 244, 435 S.E.2d 641 (Va. 1993)	Private figure (nonmedia)	Jury award of compensatory and punitive damages	Reversed and remanded	Yes as to actual malice	**Actual malice**: on all but one of the claims, court finds insufficient evidence of actual malice. **Negligence**: evidence viewed in light most favorable to appellee and verdict reversed only if clearly erroneous. **Evidentiary ruling**: prejudicial effect of article substantially outweighed probative value; trial court's admission of article was abuse of discretion. **Defamatory nature of communication**: court reviews record, finding sufficient information that defendant was negligent in ascertaining the truth of his statements regarding criminal nature of plaintiff's activities to submit question to jury.
Dixon v. Ogden Newspapers Inc, 416 S.E.2d 237, 20 Med. L. Rptr. 1169 (W. Va. Sup. Ct. App. 1992), *cert. denied*, 113 S.Ct. 325 (1992)	Public official (media)	Jury award of compensatory and punitive damages, with judgment n.o.v. entered as to punitive damages	Reversed	Yes as to actual malice, as to defamatory meaning, as to fair report, and as to libel by implication	**Fair report of judicial proceeding**: although article omitted time of vice raid, it was a substantially accurate report. **Actual malice**: plaintiffs failed to prove, by clear and convincing evidence, that defendants intentionally omitted time.

APPEALS	STATUS OF PLAINTIFF (DEFENDANT)	JUDGMENT APPEALED FROM	RESULT ON APPEAL	IAR APPLIED/ NOT APPLIED	OTHER LEGAL ISSUES ADDRESSED ON APPEAL
Hinerman v. Daily Gazette Co., Inc., 188 W. Va. 157, 423 S.E.2d 560, 20 Med. L. Rptr. 2169 (W.V. Sup. Ct. App. 1992), *cert. denied*, 113 S.Ct. 1384 (1993)	Private figure (public official at trial court) (media)	Jury award of compensatory and punitive damages	Affirmed	Yes as to actual malice	**Depth of independent appellate review:** *"Although credibility determinations are reviewed under the clearly erroneous standard ... the reviewing court must examine for [itself] the statements to see ... whether they are of a character which the principles of the First Amendment ... protect." (quoting Connaughton, Bose, New York Times).* **Plaintiff status**: trial court erred in treating plaintiff as public official; appellate court holds him to be private figure. **Fair comment**: not applicable when defamatory facts are implied. **Fair report of judicial proceeding**: not applicable unless report is accurate and fair. **Retraction statute**: court favorably cites California retraction statute as means of accommodating reputational and First Amendment interests. **Dissent**: *"[majority opinion] contains a virtual Aegean stables' worth of error and surplusage."* Fair report privilege should have been dispositive, as article was substantially true summary of underlying proceedings. *See Dixon.*

VIII. INDEX TO CASES STUDIED

APPEALS	LEAD ATTORNEY	FIRM	BRIEF AT LDRC?	PAGE NO.
Brooks v. American Broadcasting Company (6th Cir. 1993)	Terrence J. Clark, Esq.	Squire, Sanders & Dempsey, Cleveland, OH	Yes	B3
Brown v. K.N.D. Corp. (Conn.App. 1987)	Sidney T. Schulman, Esq.	Springfield, MA		A11
Brown v. K.N.D. Corp. (Conn. 1987)	Sidney T. Schulman, Esq.	Springfield, MA		A11
Brown v. Petrolite Corporation (5th Cir. 1992)	Clifford Gunter, III, Esq.	Bracewell & Patterson, Houston, TX	Yes	B2
Brown & Williamson v. Jacobson (7th Cir. 1987)	P. Cameron DeVore, Esq.	Davis Wright Tremaine, Seattle, WA	Yes	A5
Burke v. Deiner (N.J. 1984)	Joseph J. Benedict, Esq.	Benedict & Altman, New Brunswick, NJ		A16
Carney v. Santa Cruz Women Against Rape (Cal. Ct. App. 1990)	Harold J. McElhinny, Esq.	Morrison & Foerster, San Francisco, CA	Yes	B5
Charlottesville Newspapers, Inc. v. Matthews (Va. 1985)			Yes	A24
Connaughton v. Harte-Hanks Communications, Inc. (6th Cir. 1988)	Richard L. Creighton, Jr., Esq.	Keating, Muething & Klekamp, Cincinnati, OH	Yes	A4
Costello v. Capital Cities Communications (Ill. App. 1987)	Robert B. Hoemeke, Esq.	Lewis & Rice, St. Louis, MO	Yes	A13
Costello v. Capital Cities Communications (Ill. 1988)	Joseph Martineau, Esq.	Lewis & Rice, St. Louis, MO	Yes	A13
Covey v. Detroit Lakes Publishing Co. (Minn. Ct. App. 1992)	H. Patrick Weir, Esq.	Vogel, Brantner, Kelly, Knutson, Weir & Bye, Fargo, ND	Yes	B11
Curran v. Philadelphia Newspapers, Inc. (Pa. Super. 1988)	Sam Klein, Esq.	Dechert, Price & Rhoads, Philadelphia, PA		A20
Dalbec v. Gentleman's Companion (2d Cir. 1987)	John H. Gross, Esq.	Anderson, Kill, Olick & Oshinsky, NYC	Yes	A1
Dale v. Ohio Civil Service Employees Ass'n. (Ohio App. 1989)	John J. Sullivan, Esq.	Kirschner, Weinberg & Dempsey		B13

APPEALS	LEAD ATTORNEY	FIRM	BRIEF AT LDRC?	PAGE NO.
Dale v. Ohio Civil Service Employees Ass'n. (Ohio 1991)	Linda K. Fiely, Esq.	Kirschner, Weinberg & Dempsey		B14
Dannis v. C & G Publishing Inc. (Mich. Ct. App. 1991)	Jo Robin Davis, Esq.	Kaufman & Payton, Farmington Hills, MI		B9
Deaver v. Hinel (Neb. 1986)	Alan E. Peterson, Esq.	Cline, Williams, Wright, Johnson & Oldfather, Lincoln, NE	Yes	A16
Diesen v. Hessburg (Minn. App. 1989)	Thomas R. Thibodeau, Esq.	Johnson, Killen, Thibodeau & Sieler, Duluth, MN	Yes	A15
Diesen v. Hessburg (Minn. 1990)	Thomas R. Thibodeau, Esq.	Johnson, Killen, Thibodeau & Sieler, Duluth, MN	Yes	B11
Dixon v. Ogden Newspapers Inc. (W. Va. Sup. Ct. App. 1992)	Herbert G. Underwood, Esq.	Steptoe & Johnson, Clarksburg, WV	Yes	B15
Dodson v. Dicker (Ark. 1991)				B5
Dombey v. Phoenix Newspapers, Inc. (Ariz. 1986)	James F. Henderson, Esq.	Gust, Rosenfeld, Divelbess & Henderson, Phoenix, AZ	Yes	A9
Doubleday v. Rogers (Tex. 1984)	Robert M. Callagy, Esq.	Satterlee & Stephens, NYC		A22
Douglass v. Hustler Magazine Inc. (7th Cir. 1985)	Glen H. Kanwit, Esq.	Hopkins & Sutter, Chicago, IL		A5
Draghetti v. Chmielewski (Mass. 1994)	David A. Robinson, Esq.	Longmeadow, MA		B9
Ellerbee v. Mills (Ga. 1992)	Michael Weinstock, Esq.	Weinstock & Scavo, Atlanta, GA	Yes	B6
Falwell v. Flynt (4th Cir. 1986)	Alan L. Isaacman, Esq.	Cooper, Eckstein & Hurewitz, Beverly Hills, CA	Yes	A2
Fitzpatrick v. Philadelphia Newspapers, Inc. (Pa. Super. 1989)				B14

APPEALS	LEAD ATTORNEY	FIRM	BRIEF AT LDRC?	PAGE NO.
Fleming v. Bedford (Va. 1985)				A25
Frisk v. News Company (Pa. Super. 1986)				A19
Fuller v. Russell (Ark. 1992)	Christopher O. Parker, Esq.	Eichenbaum, Scott, Miller, Liles, & Heister, Little Rock, AR		B5
Gazette Inc. v. Harris (Va. 1985)				A23
Grau v. Kleinschmidt (Ohio 1987)	Sheldon D. Schecter, Esq.	Cleveland, OH	Yes	A17
Great Coastal Express, Inc. v. Ellington (Va. 1985)				A25
Hardin v. Santa Fe Reporter (10th Cir. 1984)	Saul Cohen, Esq.	Sutin, Thayer & Brown, Santa Fe, NM	Yes	A7
Henrichs v. Pivarnik (Ind. Ct. App. 1992)	Joseph A. Morris, Esq.	Morris, Rathnau & De La Rosa, Chicago, IL	Yes	B6
Herceg v. Hustler (5th Cir. 1987)				A3
Hinerman v. Daily Gazette Co., Inc. (W.V. Sup. Ct. App. 1992)	Harry P. Waddell, Esq.	Steptoe & Johnson, Clarksburg, WV	Yes	B16
Hines v. Arkansas Louisiana Gas Co. (La. Ct. App. 1993)	Donna Galchus, Esq.	McGlinlchey, Stafford & Lang, Little Rock, AR	Yes	B7
Holbrook v. Casazza (Conn. 1987)				A11
Ingber v. Ross (D.C. App. 984)	William Caldwell, Esq.			A12
Ingles v. Dively (Va. 1993)	Davis Bugg, Jr., Esq.	Rumsey, Breeden, Hubbard, Bugg & Terry, Irvington, VA		B15
J & C Inc. v. Combined Communications Corp. of Kentucky (Ky. Ct. App. 1987)	John B McCrory, Esq.	Nixon, Hargraves, Devans & Doyle, Washington, DC		A14

APPEALS	LEAD ATTORNEY	FIRM	BRIEF AT LDRC?	PAGE NO.
Keohane v. Wilkerson (Co. Ct. App. 1993)	A. Bruce Jones, Esq.	Holland & Hart, Denver, CO	Yes	B5
Landsdowne v. Beacon Journal Publishing Co. (Ohio 1987)	Norman S. Carr, Esq.	Roetzel & Andres, Akron, OH	Yes	A17
Landsdowne v. Beacon Journal Publishing Co. (Ohio App. 1989)	Norman S. Carr, Esq.	Roetzel & Andres, Akron, OH	Yes	A18
Lerman v. Flynt Distributing (2d Cir. 1984)	Edward S. Rudofsky, Esq.	Zane & Rudofsky, NYC	Yes	A1
Levine v. CMP Publications (5th Cir. 1984)	Donald C. Templin, Esq.	Haynes & Boone, Dallas, TX	Yes	A2
Locricchio v. Evening News Ass'n (Mich. Ct. App. 1989)	Richard E. Rassel, Esq.	Butzel, Long, Gust, Klein & Van Zile, Detroit, MI	Yes	A15
Locricchio v. Evening News Ass'n (Mich. 1991)	Richard E. Rassel, Esq.	Butzel, Long, Gust, Klein & Van Zile, Detroit, MI	Yes	B10
Lovett v. Caddo Citizen (La. Ct. App. 1991)	David M. Touchstone, Esq.	Touchstone & Wilson, Bossier City, LA	Yes	B7
Lyons v. Rhode Island Public Employees Council (R.I. 1986)	Milton Stanzler, Esq.	Stanzler & Biener, Providence, RI		A21
Lyons v. Rhode Island Public Employees Council (R.I. 1989)	David E. Kendall, Esq.	Williams & Connolly, Washington, DC		A21
Mahoney v. Adirondack Publishing Co. (N.Y. App.Div. 1986)	Henry A. Fischer, Esq.	Fischer, Hughes, Bessette & Edwards, Malone, NY	Yes	A17
Mahoney v. Adirondack Publishing Co. (N.Y. 1987)	C. David Morrison, Esq.	Steptoe & Johson, Clarksburg, WV	Yes	A17
Major v. Drapeau (R.I. 1986)				A21
Marcone v. Penthouse (3d Cir. 1985)	Norman Roy Grutman, Esq.	Grutman, Miller, Greenspoon & Hendler, NYC	Yes	A1

APPEALS	LEAD ATTORNEY	FIRM	BRIEF AT LDRC?	PAGE NO.
Martin v. Wilson Publishing Co. (R.I. 1985)			Yes	A20
McAvoy v. Shufrin (Mass. 1988)	Gary D. Buseck, Esq.	Park, Coulter, Daley & White, Boston, MA	Yes	A14
McCoy v. Hearst (Cal. Ct. App. 1986)	Walter R. Allan, Esq.	Pillsbury, Madison & Sutro, San Francisco, CA	Yes	A10
McDowell v. Paieworsky (3d Cir. 1985)	Samuel H. Seymour, Esq.	Chapman, Duff & Paul, Washington, DC		A2
McKinley v. Baden (5th Cir. 1985)	Dan E. Melichar, Esq.	Alexandria, LA		A3
McNair v. Worldwide Church of God (Cal. Ct. App. 1987)	Ellis J. Horvitz, Esq.	Browne & Woods, Horvitz, Legy & Amerian, Los Angeles, CA	Yes	A10
Medical Mutual Liability Insurance Society of Maryland v. Dixon Evander & Assoc. (Md. Ct. App. 1992)	David M. Funk, Esq.	Venable, Baetjer & Howard, Baltimore, MD		B8
Meridian Star, Inc. v. Williams (Miss. 1989)				B12
Miami Herald Publishing Co. v. Ane (Fla. 1984)	Talbot D'Alemberte, Esq.	Steel, Hector & Davis, Miami, FL	Yes	A12
Michigan Microtech Inc. v. Federated Publications, Inc. (Mich. Ct. App. 1991)	Webb A. Smith, Esq.	Foster, Swift, Collins & Smith, Lansing, MI	Yes	B9
Miller v. Woods (Ga. App. 1986)	John M. Brown, Esq.	Clayton, GA		A12
Morris v. Warner (Ct. App. Ariz. 1989)	Arthur P. Greenfield, Esq.	Winston & Strawn, Phoenix, AZ		A10
Mr. Chow v. Ste. Jour Azur (2d Cir. 1985)	Richard Kent Bernstein, Esq.	Richard K. Bernstein, Assoc., NYC		A1
National Association of Government Employees v. National Federation of Federal Employees (5th Cir. 1988)	Ronald P. McCluskey, Esq.	McCluskey & Assoc., El Paso, TX		A4

APPEALS	LEAD ATTORNEY	FIRM	BRIEF AT LDRC?	PAGE NO.
Nellis v. Miller (N.Y. App. Div. 1984)				A16
Newton v. National Broadcasting Co., Inc. (9th Cir. 1990)	Floyd Abrams, Esq.	Cahill, Gordon & Reindel, NYC	Yes	B4
Outlet v. International Security Group (Ct. App. Tex. 1985)	Mark Canaan, Esq.	Lang, Cross, Ladon Boldrick & Green, San Antonio, TX	Yes	A22
Oweida v. The Tribune-Review Publishing Co. (Pa. Super.Ct. 1991)	David G. Klaber, Esq.	Kirkpatrick & Lockhart, Pittsburgh, PA	Yes	B14
Pemberton v. Birmingham News (Ala. 1985)	James Barton, Esq.	Johnston, Barton, Proctor, Swedlaw & Naff, Birmingham, AL	Yes	A9
People's Bank and Trust Co. v. Globe International Publishing Co. (8th Cir. 1992)	Phillip S. Anderson, Esq.	Williams & Anderson, Little Rock, AR	Yes	B3
Port Packet Corporation v. Lewis (Va. 1985)			Yes	A24
Prozeralik v. Capital Cities Communications, Inc. (N.Y. App. Div. 1993)	Floyd Abrams, Esq.	Cahill, Gordon & Reindel, NYC	Yes	B12
Prozeralik v. Capital Cities Communications, Inc. (N.Y. 1993)	Floyd Abrams, Esq.	Cahill, Gordon & Reindel, NYC	Yes	B12
Rabren v. Straigis (Fla. Dist. Ct. App. 1986)	Gregory G. Jones, Esq.	Carlton, Fields, Ward, Emanuel, Smith & Cutler, Tampa, FL	Yes	A12
Reuber v. Food Chemical News, Inc. (4th Cir. 1991)	Aaron L. Handleman, Esq.	Eccleston & Wolf, Washington, DC	Yes	B1
Richmond Newspapers v. Lipscomb (Va. 1987)	Alexander Wellford, Esq.	Christian, Barton, Epps, Brent & Chappell, Richmond, VA	Yes	A26
Rouch v. Enquirer & News of Battle Creek Michigan (Mich. Ct. App. 1990)	Robert C. Bernius, Esq.	Nixon, Hargrave, Devans & Doyle, Washington, DC	Yes	B10

APPEALS	LEAD ATTORNEY	FIRM	BRIEF AT LDRC?	PAGE NO.
Rouch v. Enquirer & News of Battle Creek Michigan (Mich. 1992)	Elizabeth M. Ahern, Esq.	Nixon, Hargrave, Devans & Doyle, Washington, DC	Yes	B11
Scripps v. Ball (Ky. Ct. App. 1987)	Bruce W. Sanford, Esq.	Baker & Hostetler, Washington, DC	Yes	A13
Shenandoah Publishing House, Inc. v. Gunter (Va. 1993)	David J. Andre, Esq.	Andre & Fowler, Winchester, VA		B14
Speer v. Ottaway Newspapers (8th Cir. 1987)	Robert D. Sack, Esq.	Gibson, Dunn & Crutcher, NYC	Yes	A7
Sprague v. Walter (Pa. Super. 1986)	Sam Klein, Esq.	Dechert, Price & Rhoads, Philadelphia, PA		A18
Starkins v. Bateman (Ariz. Ct. App. 1987)	Michael W. Foster, Esq.	Jones, Skelton & Hochuli, Phoenix, AZ		A10
Stickney v. Chester County Communications, Ltd. (Pa. Super. 1987)				A19
Straw v. Chase Revel, Inc. (11th Cir.)	Roy E. Barnes, Esq.	Barnes, Browning, Tanksley & Casurella, Marietta, GA	Yes	A7
Tavoulareas v. Piro (D.C. Cir. 1987)	Edward Bennett Williams, Esq.	Williams & Connolly, Washington, DC	Yes	A8
Tosti v. Ayik (Mass. 1985)	Gary R. Greenberg, Esq.	Goldstein & Manello, Boston, MA	Yes	A14
Wanless v. Rothballer (Ill. App. 1986)				A12
Wanless v. Rothballer (Ill. 1986)	Arthur B. Hanson, Esq.	Hanson, O'Brien, Birney & Butler, Washington, DC		A12
Warner v. Kansas City Star Co. (Mo. App. 1987)	William L. Turner, Esq.	Gage & Tucker, Kansas City, MO	Yes	A16
Weldy v. Piedmont Airlines (2d Cir. 1993)	W.T. Cranfill, Jr., Esq.	Blakeney & Alexander, Charlotte, NC	Yes	B1
Williams v. Pulitzer Broadcasting Co. (Mo. App. 1986)	Robert Hoemeke, Esq.	Lewis & Rice, St. Louis, MO	Yes	A15