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Suing the Press: Libel, the Media, and Power

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SUING THE PRESS: LIBEL, THE MEDIA, AND POWER By *Rodney A. Smolla.* New York: Oxford University Press. 1986. Pp. viii, 277. $18.95.

Legal systems reflect the cultures which conceived them. Developments in the law theoretically follow changes in societal standards, with certain basic beliefs serving as a foundation for the entire system. *Suing the Press: Libel, the Media, & Power,* by Rodney A. Smolla,[1] attempts to show specifically how the law of libel has changed in the last twenty years in conjunction with American culture. Smolla, by examining several noted libel cases from the last two decades, shows how cultural changes affect jurors' attitudes toward the law of libel. He explains what these views are and how they developed from society's view of the media, and he concludes by offering suggestions for reform in the law.

Smolla contends that most states' present libel laws are not consistent with "[the] natural human habits of mind," and that as juries overreact to libel suits, their decisions are "far out of line . . . from either the formal rules of libel law or the conventions of modern journalism" (p. 189). Smolla also claims that the explosion of libel suits since *New York Times v. Sullivan*[2] was decided in 1964, "supposedly a great liberating press victory" (p. 25), is largely a result of the way Americans currently view themselves, the media, and the relationship between the two. These theories, posited in the initial chapter, serve as the foundation for the remainder of the book and provide the most valuable insights that Smolla has to offer.

One explanation which Smolla offers for the increase in libel litigation is that Americans today simply do not trust the press. He cites a recent Harris survey which indicated that only 20% of those polled had a great deal of confidence in the media (p. 9). He suggests that mistrust and suspicion of the media are fueled by incidents such as the scandalous revelation that the Pulitzer Prize-winning *Washington Post* stories by Janet Cooke about an eight-year-old heroin addict were fabricated (p. 9). In addition, Smolla argues that in the past Americans did not view the news with the reverence that they do today because they recognized that newspapers, and the news that they reported, were an extension of their publishers' personalities and ideologies. In the past, people expected some bias and evaluated those news accounts accordingly. Today, however, reporters — especially television news anchors — are often held in high esteem and are

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2. 376 U.S. 254 (1964).

viewed as purveyors of "the Truth." Someone like Walter Cronkite, for example, holds a sanctified position in the minds of many. This glorified view of the media, Smolla contends, is partly responsible for the increase in libel litigation. Juries which have been very unsympathetic to media defendants "may be reflecting a general public backlash against that oracular role" (p. 11).

A suit brought by William P. Tavoulareas, the president and chief executive officer of Mobil Oil Corporation, against the *Washington Post* is an example of this phenomenon.[3] A front-page story in the November 30, 1979, edition of the *Post* reported that Tavoulareas had used his influence to set up his son, Peter, in a newly formed shipping business which had business dealings with Mobil. The obvious implication of the story was that there was some impropriety in this arrangement. During the course of the trial it became apparent that no such impropriety had existed; Tavoulareas had revealed all of these activities to the board of directors, and had excused himself from the decision-making process in matters concerning his son. Libel law, as articulated in *Sullivan,* allowed a recovery by Tavoulareas only if the *Post* had acted recklessly with regard to the truth of the story. The jury, however, seemingly ignored this standard, and awarded damages based on the fact that the tenor of the article suggested something which was untruthful. In effect, the jury held the *Post* strictly liable for the truthfulness of its story. Smolla suggests that this reflects the jury's backlash against the exalted position the media seems to have assumed in today's society. The danger in this, according to Smolla, is the possibility that the media may be forced to decrease its investigative reporting.

Another reason Smolla suggests for the explosion in libel litigation is the "general increase in the sensitivity of the media's victims" (p. 15). Smolla labels this phenomenon "the general thinning of the American skin" (p. 16). Americans today feel a profound need to protect their self-image, and libel suits have become the prevalent remedial device used when a newspaper article or television broadcast somehow injures that self-image. "As Americans spend more and more of the gross national product on narcissistic self improvement, as increasing effort and expense is spent on first finding and then nurturing the inner self, one might expect greater umbrage to be taken when that self is damaged" (p. 19). This motivation for filing a libel suit becomes even clearer when such noted plaintiffs as William Westmoreland and Carol Burnett make public their intentions to donate any damage awards to charity. The desire for a good public image, rather than an economic damages award, is their primary reason for seeking retribution through the courts.

3. 567 F. Supp. 651 (D.D.C. 1983) (entering judgment notwithstanding the verdict in favor of the *Post*), *affd. on rehearing,* 817 F.2d 762 (D.C. Cir. 1987) (en banc).

This cultural phenomenon affects aspects of media law other than libel law as well. Smolla presents the Jacqueline Kennedy Onassis suit against Christian Dior as an example of a case motivated by the desire to preserve one's image for oneself.[4] Dior used an actress named Barbara Reynolds, who looked remarkably similar to Onassis, in one of its advertisements. Onassis obtained a court order banning any further publications of the ad based on the theory that it used her image for the purposes of trade without first obtaining her consent. Even though the person in the ad was not actually Onassis, the court granted the order, reasoning that the law must prevent the appropriation of a public person's essence through the unauthorized use of that person's visual image. Smolla points out that the court reached this decision despite evidence that an examination of the ad made it clear that it was not Onassis in the picture, and that her endorsement of the product was not the subject of the advertisement. Smolla argues that this expansion of the concept of a protected self-image was fueled by shifts in American culture from the sixties to the eighties. He sees "the thinning of the American skin" as a major factor in the increase in libel suits.[5]

The size of the awards that juries are willing to give successful plaintiffs in libel actions reflects yet another way the law of libel has changed along with American culture. Many find it particularly disturbing that the amount of these awards bears no apparent relation to the amount of harm incurred. Smolla cites Carol Burnett's suit against the *National Enquirer* as an indication of this.[6] The *National Enquirer* published an article which accused Carol Burnett of being in a drunken state in a Washington, D.C. restaurant and engaging in an argument with Henry Kissinger while there. These groundless allegations undoubtedly caused some personal distress to Burnett. In the case, however, there was no evidence which indicated that she lost work because of the article, or that she suffered any permanent physical or psychological damage because of it. In fact, as Smolla points out, the article may have actually enhanced her reputation because her crusade against the magazine made her a heroine among her peers. The jury, however, awarded Burnett $1.6 million in damages. Smolla concludes that "juries are simply becoming more openly supportive of compensating injuries to the psyche, and judges are becoming more willing to let juries do so" (p. 25). Smolla points out that this generos-

4. Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984), *aff'd.*, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (N.Y. App. Div. 1985).

5. P. 16. Courts have even protected the self-image of people who have died. For example, Elvis Presley impersonators have been prevented from performing because their acts commercially exploit the likeness of Presley. Pp. 124-27.

6. Burnett v. National Enquirer, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed,* 465 U.S. 1014 (1984).

ity of juries leads to even more libel suits since plaintiffs are attracted by potentially large damage awards.

Smolla concludes with some ideas for reforming the law of libel. However, none of these suggestions are entirely original,[7] and some actually contradict points made earlier in the book. For example, Smolla proposes that the losing side in a libel case pay the attorneys' fees of the winning side. This supposedly would deter plaintiffs from bringing dubious claims and may serve to deter those plaintiffs who are motivated by money alone. Earlier in the book, however, Smolla pointed out that many plaintiffs are not motivated by money, but by a sincere desire to protect their self-image. If this is true, the payment of attorneys' fees would not effectively deter these plaintiffs. Furthermore, when the media lost it would be forced to pay the plaintiff's legal fees on top of any damage award, and this would further chill speech.

The bulk of *Suing the Press* consists of Smolla's accounts of actual libel cases, including their circumstances and decisions. These descriptions add nothing significant that could not be gleaned by reading the trial transcripts and appellate decisions themselves. There are some unique thoughts offered by Smolla, such as the idea that the *National Enquirer* in effect condemned Carol Burnett's reputation and paid its fair market value in accordance with the law of eminent domain. The subject matter also affords Smolla the opportunity to comment on such diverse topics as pornography, Vietnam, the Middle East, and Elvis Presley imitators. For the most part, however, the accounts are simply more readable versions of the cases themselves.

The value of the book lies in its discussion of how the law conforms to cultural standards. The role that juries play in conforming the law to those standards is the thread which runs throughout the book and helps to tie together the disparate chapters. The book may have been more valuable had this theme been applied to areas of the law other than media law. This underlying foundation, however, does provide a focus to the book, and makes *Suing the Press* a thought-provoking work.

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7. *See* Van Alstyne, *First Amendment Limitations on Recovery From the Press—An Extended Comment on the "Anderson Solution,"* 24 WM. & MARY L. REV. 793 (1984); Taylor, *Cost of Libel Suits Prompts Calls to Alter System,* N.Y. Times, Feb. 25, 1985, at A11, col. 1.