RESPONSES TO PROFESSOR FRANKLIN*

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DAN M. BURT

I appreciate this opportunity to comment on Professor Franklin's Paper. I approach this topic from the plaintiff's perspective, the less than pleasant perspective of the public figure libel victim. Dante said there is a sign over the Gates of Hell which cautions all those who enter to leave all hope behind them. Surely our libel laws should not force all those who enter the public domain to leave all hope of fair and honest reportage behind them when they take public office, or worse, appear in the public eye.

I believe that there is a fundamental flaw in Professor Franklin's analysis. Professor Franklin mentioned only three roles for the press—originator, repeater, and bulletin board. But he neglected to mention the fourth and most important function of the press—the press as a power center, as a maker and a breaker—an institution that makes money, determines events, and possesses great power for harm as well as good. Professor Franklin's willingness to treat the press as an absolutely neutral and benign conduit forms part of the framework within which he works, and also explains why the public is so at odds with the current law of libel.

Reflect on the Hearst papers and the days of yellow journalism; recall that there has rarely been a time when the public looked at the press as a benign institution fostering society's highest goals. In small towns, the ability of a newspaper or a television station to create harm may be even greater than the power of a paper like the *New York Times* or a network like ABC. This explains why there is so much unhappiness with the *Sullivan*

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rule, and also why in the past six months the courts seem to be moving away from the *Sullivan* rule.

One of the cases which Professor Franklin did not emphasize was the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders*. The shocking thing to me in the *Dun & Bradstreet* case was that it was not really a free speech case, but rather a commercial speech one. Yet, there was a concurrence by Justice White, who was a member of the original *Sullivan* panel, which in effect said that I now believe that the Court struck the balance in *Sullivan* the wrong way. This should shock you. If you analyze the press as having four, rather than three functions, I believe one begins to strike the balance very differently than does Professor Franklin.

The *Sullivan* rule, with a modification in the burden of proof, is essential for society, because every public official, even including the cop on the beat, wields a great deal of power. But I am concerned about all aggregations of power and believe they must be carefully checked and balanced. After all, you may like the press today and not like it tomorrow; if Ted Turner were to take over CBS, there might be many people who would not like the evening news as much as they like it now.

An area of libel law that Professor Franklin did not address was whether there should be any *Sullivan* protection for the press once a person steps out of office. We live in a reasonably civilized society in which, presumably, you should not be forced to always carry with you all the burdens of your prior activities.

I suggest we should go back to the old, reasonably strict standards of liability in the area of the public figure. In brief, my argument is that Professor Franklin's analysis and the analysis of all the violently pro-press people is radically flawed in that it does not take account of an important fact; that the press is a large, money-making, powerful institution. That fact explains why the public is disaffected with the press today. It explains the way the courts seem to be heading; there is a clear trend away from protecting the press. I have suggested why that may be happening. I also have suggested an additional aspect to Professor Franklin's analysis. I think that aspect argues for a reduction in *Sullivan's* protection.

PHYLLIS W. BECK

When I was invited to appear on this panel, I realized that I was asked not only because I am judge, but also because I am the only genuine public official participating in this Symposium. Pennsylvania has the unfortunate system of electing all judges, including appellate judges, and I won a highly partisan statewide contest. That is how I was elected to the court.

After reading Professor Franklin's Paper, I found myself agreeing with him. I thought that was rather foolish of me. As a public official I was taking a stand against my own self-interest, diminishing the possibility of recovery if ever I sued a newspaper for defamation. The idea of my suing the newspapers is not too farfetched. Three Pennsylvania appellate judges are presently suing newspapers.

One of the reasons that Professor Franklin argues we should not abandon the actual malice standard and adopt the absolute privilege standard is that the newspapers themselves would lose credibility. If the newspapers were immune from suits, the theory goes, they might be viewed as acting irresponsibly and thereby might cause the public to lose confidence in them. I do not agree with this reason, but I do agree with his conclusion that we retain the actual malice standard.

The reading public's confidence or lack thereof in the press does not depend on whether the press is immune from suits, and the press' integrity or lack thereof does not depend on whether they are immune from suits. The reading public develops confidence in the media if they perceive the media as being fair, and the number of libel recoveries has little impact on that perception.

At best, the public has a love/hate relationship with the press. I do not believe that it stems from the public's reaction to newspapers alone. I do not know anybody who is not offended by a television reporter who puts a microphone in a mother's face and says "how do you feel now that your child is dead?" There is a spillage from that kind of obnoxious behavior onto the newspapers. I am not sure that the newspapers deserve the "bum rap" that they get.

I also want to make some comments about the negligence standard and what I see happening in the future. Based on what Mr. Burt said, together with Justice White's opinion in the *Dun & Bradstreet* case, I sense a change away from the actual malice standard to a much less stringent one. For example, in the Pennsylvania Constitution, unlike the federal one, there is a provision which protects reputation, in addition to a provision guaranteeing freedom of the press. I predict that constitutionally mandated protection of reputation will erode the free press

guarantees. Thus, in order to bolster the guarantees of freedom of the press, the actual malice standard must be maintained.

I want to touch on one thing that several of the other speakers addressed, and that is whether legislatures should examine alternatives to actions for libel. Professor Franklin, himself, has a unique proposal; *i.e.*, an allegedly injured plaintiff may bring a declaratory action limited to the question of whether the published statements in question are true or false.

Punitive damages is the other area which certainly has a growing impact on freedom of the press. I do not have a crystal ball. However, I do not see that juries have a great deal of sympathy for the press, and I sense that they have concluded that an erring press should be subjected to punitive damages. Unless the law limits punitive damages, I predict newspapers will be exposed to substantial liability.

Last, a few comments about the press as repeater. Should the press be permitted to reprint a lie by or about a public official with immunity so long as it accurately reports what someone else says and tells its readers the source of the statement? I agree with Professor Franklin that there should be an absolute privilege when a newspaper reports about public officials or candidates for office.

However, Professor Franklin's proposal is overly modest. It should be extended to reportage beyond strictly public officials. Or in the alternative, the term public official should be defined broadly. I will give one example. It would be desirable for newspapers to have absolute privilege in repeating reports about persons involved in significant public events. It was important for citizens in our democracy to learn all that they could about Lieutenant Calley and his involvement in the My Lai incident during the Vietnam War. Lieutenant Calley is not, strictly speaking, a public official. But reports about him and My Lai bear on the citizenry's evaluation of our President's stewardship of foreign policy and as Commander-in-Chief. I suggest that the law might develop so as to define Lieutenant Calley as a public official for limited purposes, because his actions are inextricably intertwined with essential governmental action. The repeater's privilege could then be broadened to include reporting statements made by or about Lieutenant Calley.

In conclusion, I agree with Professor Franklin's defense of the actual malice standard, and I would suggest formulating a model to broaden the absolute privilege for repeaters.

NORMAN PEARLSTINE

Just because I have advocated subpoena power for reporters does not mean that I am pro-press. No, I am violently pro-press.

When I graduated from law school, I tried to figure out what I had learned in my three years at the University of Pennsylvania. First, I guess I felt qualified to sit on the Supreme Court, because I had spent so much time reading appellate decisions. Second, since I was going into journalism, I realized that I should never go very far without having a lawyer at hand. Therefore, I asked Bob Sack, General Counsel to Dow Jones and author of *Libel, Slander, and Related Problems*, if he could join me here today. I am grateful that Bob is here, if I get into real trouble.

This brings me to the third lesson. When Bob Mundheim asked me if I would come here today, I said that I was not sure it was appropriate for me to address this group. As an editor, I must confess that I very rarely, if ever, think about legal precedents, cases, or anything like that when trying to do my job. I look at a story and try to say—is it fair? Is it accurate? Is it something we ought to print? Is it something I have to show Bob or can we just go to press?

So in my case it was very constructive to read Professor Franklin's Paper, because in my daily working life I pay little attention to the concerns raised in his Paper. That may shock you, but I think it is probably true of most reporters and editors. The issues that are being raised here today are very rarely discussed in the newsroom, except for the once or twice a year that a lawyer is brought in to give us a talk on libel law. That in itself may be a real problem for us and something on which we ought to spend more time.

In thinking about Professor Franklin's Paper, there are a number of areas which we should address. One is the question who is a public official? I think our conversation and discussion has been about publicly-elected officials, but as Dan Burt suggested, we ought to think about the press as a power. In viewing who are public officials, we look at who has the power, as well as who is responsible for the governance. Thus, at *The Wall Street Journal* one of the things we try to focus on is whether the president of Mobil Oil or the chairman of I.B.M. or General Motors should also be regarded as a "public official."

We also do discuss issues of malice and negligence as alternative tests or standards. Frankly, as an editor I find both of

them equally unsatisfactory, and in that regard not only am I dissatisfied with *Sullivan*, but with its alternatives.

On the issue of malice, there is the question of state of mind. Whose state of mind is relevant? It is not always enough to just look to the reporter. The process from which a fact becomes a story or gets into a paper involves so many people and so many conflicting opinions that I find it almost impossible to determine state of mind standards.

Second, I think it is hopeless to count on judges or juries to come to a right decision in these cases, whether they are in favor of the press or the plaintiffs. We have seen statistics that suggest something close to 83% of the cases that go to a jury were in favor of the plaintiff, and about 70% of them are reversed on appeal. This is really not just a problem for the press but for a lot of people who have to get involved with lawyers, with judges, and with the judicial system. This seems to be an odd way to ascertain whether damages were done to someone.

Another of the things about the malice standard that I think is particularly troublesome to us is that it seems to penalize the aggressive reporter. In *Tavoulareas*, for example, one of the important points was that the reporters involved were doing exactly what editors have been telling reporters to do as long as we have had publications. They were told to be hard-hitting, to really try to get behind the public facade, and to find out what the story really was all about. Now, that seems to be something for which you can be penalized. The message being given to publications is that it is better to be a stupid, lazy, slothful reporter than to be an aggressive, hard-hitting one.

Somewhat along the same lines, is the sudden importance of reporters' notes. One of the things that we do talk about is what reporters do with their notes. Do we bury them? Often the things that are in a reporter's notes that do not get into a story say a lot about how good the reporter may be. Nonetheless, the jurors who are trying to figure out a malice standard often find themselves more intrigued with what was in the notes than what was in the story. That is a very difficult position for us.

When I look at a negligence standard, I ask myself whether we really want to punish people for publishing something they believe to be true. I think that is what the issue really is. As much as I take great pride in the product not only of my paper, but of the bulk of the press, we often like to say that a story is really like an iceberg. The reporter is lucky if he or she gets one-seventh of what really happened. The rest of it remains under

water, if you will. To hold the reporter to some kind of absolute standard of truth will just not work; while the cases do not say that is the standard, I think that the juries become rather intrigued by what kinds of things the reporter did not find out or did not write.

I would guess that at least half the cases involving allegations of libel have resulted from stories that were written for the next day's paper. People were on deadlines; when reporters and editors are on deadlines they are doing the best they can, but one can always find examples of things that a reasonable person might have done that were not in the final written article. While from the standpoint of legal doctrine we can be content with a kind of reasonable man standard, I find juries have a much harder time understanding that.

As for the repeater problem, although this may not be very satisfying to you, it really seems to me a problem that is beyond editors' and reporters' control. There is an extraordinary amount of copy in a paper that is basically saying what someone said or repeating what someone said. It is far more of the paper than any of us would like to admit. We would all like to believe that all of our stories are investigatory gems, but in fact, a major function of the press is its use as a bulletin board by various elements of society. And we are used. I see it at *The Wall Street Journal*, because all publicly held companies feel a duty to disclose under the securities laws; and they think it has to be in our paper. The number of press releases that we get on any given day is just extraordinary, and the ability to check anything more than that the press release was issued by the person who says he or she issued it is really very difficult for us. Thus, I do not know how you can really impose limitations on the press in terms of its repeater function without doing some very real violence to it.

With all of my complaints about the libel laws, and particularly about *Sullivan*, one of the questions I am asked quite often is, how bad is the "chill" with regard to public officials? Once again, that is difficult to answer, particularly with regard to some recent decisions. In some ways *The Wall Street Journal*, or any other large metropolitan paper, is the last place to look for "chilling."

We have been able to do the same kind of investigative reporting that we have done all along. At the same time, I think that what really "chills" us is not so much the law as the legal process. The question these days is not so much will we win or will we lose, but rather, will we go to trial? That becomes an

issue because of the time that it takes to deal with depositions and with preparing for testimony. While we have not pulled back, I think there are certain reporters on our staff who say that some stories merit going after since they are big and important enough; but there are other ones the reporters say that just are not worth the hassle.

I believe there has been a "chilling" effect with smaller publications. Some Philadelphia papers have received attention. The *Main Line Chronicle* is one paper that has basically gone back to the birth and wedding announcement business. It has stopped doing a lot of the journalism for which Ben Cramer was so famous when I was growing up in Philadelphia, and that was continued by his successors.

A final question in the public official case, perhaps addressing a point that Dan Burt was making, is whether big or small publications are power centers. My answer to that is pretty much, so what? They have always been power centers, and the whole idea of creating a freedom of speech was that it should not be inhibited. It should be robust, wide open, and have a point of view, including an economic one. I am not particularly troubled by that.

First, I think one of the things we have seen happening in the public official area lately is that there is tremendous incentive for a public official to bring a lawsuit, even if he or she believes victory is not possible. I think that the additional publicity of a case rarely damages a public official's reputation, or makes it any worse than it was prior to publication. Second, I think there is a presumption held by a substantial number of people that anybody who is outraged enough to sue must have had something wrong done to him or her; so that the mere bringing of a lawsuit and taking it, if possible, to trial is a great publicity ploy. If public officials get past summary judgment, they have a very good chance of winning. All they have to show is some lapse in the state of mind of some participant in the writing or editing process, and they get a chance to review that reporter's notes where there is a good chance to find something beneficial. I also think that a number of public officials who have brought suits have brought them saying that as long as there are either institutions like Dan Burt's that are willing to bring the suit, or in Paul Laxalt's case, opportunities to raise funds among friends to bring the suit, why not? There really is not much downside risk.

As an editor, I raise a kind of radical proposal that none of you have talked about. It is a variation on Belgian law, which I

learned publishing *The Wall Street Journal/Europe*. Let us ask the basic question, why is libel a court issue at all? Why is it something that ought to go to a judge? Why not have a compelled or mandated letter to the editor, if you will, or a bulletin board function in publications where a person who feels aggrieved could get equal space to write his or her own side? In some ways, I think editors would be appalled by that because of the amount of newsprint that it would use up. But, in fact, if the concern is damage to reputation, then why not allow for some other forum for a reply that is completely outside the legal system?