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Furture of Libel Law and Independent Appellate Review: Making Sense of Bose Corp v. Consumers Union of United States Inc.

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THE FUTURE OF LIBEL LAW AND INDEPENDENT APPELLATE REVIEW: MAKING SENSE OF *BOSE CORP. v. CONSUMERS UNION OF UNITED STATES, INC.*

INTRODUCTION

The landmark 1964 Supreme Court decision *New York Times Co. v. Sullivan*[1] granted publishers[2] significant constitutional protection from libel suits by requiring that public officials prove actual malice as a prerequisite to recovering damages. This doctrine was subsequently extended to apply to public fignres. Federal courts of appeals have enforced the *Sullivan* protections through the practice of independent appellate review, a doctrine that requires appellate review of the trial court proceedings to determine whether the facts found by the court satisfy the requirement of actual malice.[3]

In *Bose Corp. v. Consumers Union of United States, Inc.*,[4] the Supreme Court strongly reaffirmed the *Sullivan* actual malice requirement[5] and explicitly affirmed the widespread use of independent appellate review by federal appeals courts reviewing district court libel judgments.[6] Unfortunately, the *Bose* Court failed to construct a coherent and workable doctrine of independent appellate review that could apply outside the area of libel. By adopting an ad hoc labeling approach to control the application of independent appellate review, the Court confuses the distinction between questions of fact, which are subject to restricted review under the "clearly erroneous" test of rule 52(a) of the Federal Rules of Civil Procedure,[7] and mixed questions of law and fact, which appellate courts may

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1 376 U.S. 254 (1964).

2 This Note uses the term "publisher" to signify all print and broadcast media and private entities that could, through their public utterances or writings, be subject to a libel suit under *Sullivan*.

3 *See* Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949, 1958 (1984) ("[A]n 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.' ") (citations omitted).

4 104 S. Ct. 1949 (1984).

5 *See id.* at 1965-66; *see also* Abrams, *The Supreme Court Turns a New Page in Libel*, A.B.A. J., Aug. 1984, at 91, 92.

6 *See infra* note 37, and notes 38-39 and accompanying text.

7 Rule 52(a) of the Federal Rules of Civil Procedure reads in relevant part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

freely review.[8] Because the labeling process dictates the applicable level of appellate review,[9] this confusion will result in inconsistent application of independent appellate review outside the libel context. Additionally, the Court's flawed rationale may undermine what would be the clear mandate of *Sullivan* and *Bose*—that appellate courts must vigorously review libel judgments to certify compliance with the constitutional requirement of actual malice.

This Note argues that principled methods exist to distinguish between mixed questions of law and fact worthy of independent appellate review and those unworthy of the additional expenditure of resources. These methods allow appellate courts the necessary power to protect vulnerable legal rights while preserving the spirit of rule 52(a).

Section I of this Note explains the *Sullivan* actual malice standard and discusses the pre-*Bose* utilization of independent appellate review by federal courts of appeals reviewing district court libel decisions. Section II presents the facts and holding of the *Bose* case. In Section III this Note critiques the *Bose* analysis and suggests how the Court could have reached the same result more clearly without injecting uncertainty into this critical area of the law. Section IV concludes that independent appellate review of actual malice determinations under *Sullivan* remains, at least for the foreseeable future, the single most important guarantor of the press's first amendment rights.

I
HISTORICAL BACKGROUND

A. *Sullivan* and the Actual Malice Standard

The Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*[10] marks the beginning of modern libel law.[11] *Sullivan* recognized a constitutional limit on the power of the states to hold pub-

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8 For a definition of "mixed questions," see *infra* text accompanying note 88. Mixed questions and pure questions of law are not subject to rule 52(a). "[T]here is substantial authority that [mixed questions of law and fact] are not protected by the 'clearly erroneous' rule and are freely reviewable." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2589, at 753 (1971). *See also Bose,* 104 S. Ct. at 1960 ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.") (citation omitted).

9 Because findings of fact are normally given deferential review on appeal, while determinations of law are freely reviewable, blurring the distinction results in treating similar matters differently in an almost random fashion.

10 376 U.S. 254 (1964). For contemporaneous treatments of the *Sullivan* case, see generally Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment,* 1964 SUP. CT. REV. 191; Pedrick, *Freedom of the Press and the Law of Libel: The Modern*

lishers liable for falsely defaming public officials.[12] The Court subsequently expanded this category of lesser-protected entities to include "public figures."[13] In general, individuals or corporations who have thrust themselves to the forefront of a particular matter are public figures for the purpose of commentary on that matter.[14]

The *Sullivan* Court sought to minimize chilling public debate[15] by providing publishers with "breathing space,"[16] hoping to avoid editorial "self-censorship."[17] By eliminating liability for the good faith publication of defamatory falsehoods, the Court intended to promote the "uninhibited, robust, and wide-open" debate of public issues,[18] without eviscerating the public figure's common law right to protect his reputation.[19] The *Sullivan* decision and its progeny

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Revised Translation, 49 CORNELL L.Q. 581 (1964); Pierce, *The Anatomy of an Historic Decision:* New York Times Co. v. Sullivan, 43 N.C.L. REV. 315 (1965).

11 Abrams, *supra* note 5, at 90 ("*Sullivan* . . . change[d] much that had been long embedded in law."). Prior to *Sullivan,* the common law of defamation was based on the general principle that a publisher published an unintentionally defamatory statement at his own peril. In addition, the defendant in a civil suit bore the burden of proving the truth of a published statement. A complex structure of privileges, which attempted to protect the free flow of information, mitigated this harsh scheme somewhat. *See* PROSSER AND KEETON ON THE LAW OF TORTS 804 (5th ed. 1984).

12 376 U.S. at 270-83. The plaintiff in *Sullivan* was an elected city commissioner of Montgomery, Alabama.

13 The Court first extended the *Sullivan* rule to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). An expansive but short-lived reading of the public figure category emerged in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971), in which the Court held in a plurality opinion by Justice Brennan that involvement in an event of public interest could give rise to public figure status. The Court rejected this broad interpretation in Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-46 (1974), in which it noted three classes of potential public figures: (1) those deemed public figures for all purposes, (2) those who thrust themselves to the forefront of a particular controversy and hence become public figures in relation to that issue, and (3) those who become public figures through no purposeful action of their own. The Court further narrowed the public figure category in Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979), in which it held that a criminal defendant does not automatically become a public figure for purposes of comment on issues relating to his conviction. Courts must instead focus on the nature and extent of the individual's participation in the controversy.

14 Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 168 (1979).

15 376 U.S. at 279. For a general treatment of the "chilling effect" and its role in constitutional law, see Note, *The Chilling Effect in Constitutional Law,* 69 COLUM. L. REV. 808 (1969). The term was first used in Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) ("[A loyalty oath] has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . . .").

16 376 U.S. at 272.

17 *Id.* at 279.

18 *Id.* at 270.

19 *Sullivan* did not grant publishers an absolute privilege in reporting about public officials. Justice Black, well-known for his strong first amendment views, stated in *Sullivan*: "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. I regret that the Court has

outlined three elements to effectuate this goal: (1) a defamed public figure must prove that the publisher acted with actual malice;[20] (2) actual malice must be demonstrated with clear and convincing proof;[21] and (3) independent appellate review of the entire trial record is required to insure that the body of evidence meets the constitutional standard of actual malice.[22] A discussion of each of these requirements follows.

1. *Actual Malice*

To recover a libel judgment for a false and defamatory statement, a public figure plaintiff must prove that the publisher made the statement with actual malice, i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not."[23] Both formulations, actual knowledge and reckless disregard, are subjective standards.[24] Penalizing only subjectively culpable publishers protects innocent mistakes and avoids chilling public debate of important issues.[25]

Use of a subjective standard, however, creates significant problems of proof. A court cannot infer actual knowledge of falsity from what a reasonable person in the defendant's position would

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stopped short of this holding . . . ." *Id.* at 297 (Black, J., concurring) (footnote omitted).

In Hutchinson v. Proxmire, 443 U.S. 111, 133-34 (1979), the Court noted that "[s]ince . . . *Sullivan* . . . this Court has sought to define the accommodation required to assure the vigorous debate on the public issues that the First Amendment was designed to protect while at the same time affording protection to the reputations of individuals." (citations and footnote omitted). In Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 (1967), Justice Harlan stated that "the basic theory of libel has not changed, and words defamatory of another are still placed 'in the same class with the use of explosives or the keeping of dangerous animals' [as actionable torts]." (Harlan, J., plurality opinion) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 108, at 792 (3d ed. 1964)). *See also infra* note 124 and accompanying text.

20 *See infra* notes 23-28 and accompanying text.

21 *See infra* notes 29-32 and accompanying text.

22 *See infra* notes 33-37 and accompanying text.

23 *Sullivan*, 376 U.S. at 279-80.

24 Actual knowledge is a subjective standard because it refers only to the state of mind of the defendant. The Supreme Court has defined reckless disregard as a subjective standard. "[R]eckless conduct is *not* measured by whether a *reasonably prudent man* would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the *defendant in fact entertained serious doubts* as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added). *See also* Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1569 (D.C. Cir. 1984) ("The test is not an objective one . . . ."), *cert. granted*, 105 S. Ct. 2672 (1985).

25 Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949, 1966 (1984) (" 'Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in [*Sullivan*]; *Butts, Gertz,* and similar cases to limit liability to instances where some degree of culpability is present . . . .' ") (quoting Herbert v. Lando, 441 U.S. 153, 171-72 (1979)).

have known.[26] Consequently, proof of actual knowledge usually requires outright admissions of guilt from defendants.[27] Reckless disregard is only slightly easier to prove. The plaintiff must demonstrate that the defendant had such siguificant indicia of the statement's possible falsity that he was reckless in disregarding them.[28]

2. *Clear and Convincing Proof*

The second prong of the *Sullivan* test requires clear and convincing proof of actual malice.[29] Clear and convincing proof constitutes a higher standard of proof than the "preponderance of the evidence" standard[30] employed in most civil litigation but falls short of the "beyond a reasonable doubt" standard of the criminal law.[31] This heightened proof requirement shifts the benefit of the doubt toward the defendant and prevents erroneous intrusions upon "the field of free expression."[32]

3. *Independent Appellate Review*

The Court in *Sullivan* exercised independent appellate review of the entire trial record to determine whether the evidence met the

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26 *See id.* (rejecting premise that actual knowledge of falsity can be inferred because author of statement was intelligent and thus must have known that statement was false). To hold otherwise would undermine *Sullivan*'s rationale of preventing unnecessary cbilling of speech.

27 *See Herbert,* 441 U.S. at 170 ("It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself. . . .").

28 Accordingly, the courts have not found recklessness when the plaintiff cannot show that the defendant had information suggesting that the statement in question was false. *See, e.g.,* New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966) (no evidence that defendant "had clear grounds to suspect that the statements might be false."); Drotzmanns v. McGraw-Hill, Inc., 500 F.2d 830, 834 (8th Cir. 1974) (no person "entertained any suspicion that plaintiff would be libeled by the article").

29 376 U.S. at 285-86 ("[W]e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . . ."). "Convincing clarity" and "clear and convincing proof" are synonymous terms. *See, e.g., Bose,* 104 S. Ct. at 1965 ("The question whether the evidence in the record . . . is of the *convincing clarity* required . . . is not merely a question for the trier of fact . . . . Judges . . . must independently decide whether the evidence . . . is not supported by *clear and convincing proof* of 'actual malice.' ") (emphasis added).

30 *See, e.g.,* E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.14 (3d ed. 1977) (preponderance of the evidence means "to prove that something is more likely so than not so").

31 Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 195 (1st Cir. 1982); Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 940 (2d Cir.), *cert. denied,* 449 U.S. 839 (1980). *See also* Slobogin, *Dangerousness and Expertise,* 133 U. PA. L. REV. 97, 104 n.28 (1984) (quantifying levels of confidence in different proof standards as "beyond a reasonable doubt = 95% . . . ; clear and convincing evidence = 75% . . . ; and preponderance of the evidence = 51%").

32 *See Sullivan,* 376 U.S. at 285-86.

constitutional standard of actual malice.[33] This independent review required the Court to determine whether the evidence presented to the state court jury[34] satisfied the federal constitutional standard of actual malice.[35] The Court exercised independent appellate review in *Sullivan* under the expansive reach of its federal question jurisdiction.[36] The Court did not discuss whether independent appellate review could be conducted by other courts or in other contexts.[37]

B. Independent Appellate Review of Federal District Court Libel Decisions

Until *Bose* the Supreme Court had never explicitly extended the application of independent appellate review to cases decided by either judges or juries in the federal district courts.[38] Nevertheless,

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33 *Id.* at 285.

34 *Id.* at 256. The jury in the Circuit Court of Montgomery, Alabama, awarded plaintiff Sullivan $500,000. *Id.*

35 The more protective federal constitutional rule enunciated in *Sullivan* overrides the applicable Alabama libel law. "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics . . . . Alabama law . . . is inconsistent with the federal rule." *Id.* at 283-84.

36 Professors Wright and Miller perceive no obstacle to Supreme Court review of state trial court findings.

> [T]here is no injury to fundamental precepts of federalism in holding state courts to whatever standards of factfinding are within the institutional capacities of the Supreme Court as an appellate tribunal. Indeed, it could be argued that more searching review is justified (in reviewing cases from state courts), since state procedure may not be as good as federal procedure, and state courts may not be as concerned as federal courts with protecting federal rights . . . . [I]t is clear that in practice the Court has been willing at least to provide searching review of state findings in a variety of circumstances.

16 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4033, at 780-81 (1977).

37 Time, Inc. v. Pape, 401 U.S. 279 (1971), arguably provides implicit support for the use of independent appellate review in the context of reviewing a federal court actual malice determination. The Supreme Court noted that it frequently "had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment,' " but did not address the extension of independent appellate review to appeals from federal trial court decisions. *Id.* at 284 (quoting *Sullivan*, 376 U.S. at 284-85) (citations omitted). The district court had granted Time's motion for a directed verdict. *Id.* at 283. The court of appeals reversed, holding that the question whether evidence against Time sustained a finding of actual malice was a question for the jury. *Id.* Exercising independent appellate review, the Supreme Court concluded that the evidence adduced could not, standing alone, sustain a finding of actual malice. *Id.* at 289. The majority did not discuss the legal basis for its or the courts of appeals' use of independent appellate review in the federal case context.

38 The majority of the libel cases reaching the Supreme Court originated in state courts and did not provide an opportunity to extend independent appellate review to federal trial court libel judgments. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 77-79 (1964) (Louisiana Supreme Court decision reversed because state court failed to apply *Sullivan* actual malice formulation); Rosenblatt v. Baer, 383 U.S. 75, 87-88 (1966) (New Hampshire decision reversed because *Sullivan* was decided after case went to trial); Time, Inc. v. Hill, 385 U.S. 374, 394 (1967) (New York Court of Appeals decision re-

numerous circuit courts have engaged in independent appellate review in the two decades following *Sullivan*.[39] Until *Bose* no public figure plaintiff had challenged the practice. As a result, no court had directly confronted the apparent conflict between the independent appellate review doctrine and rule 52(a)[40] of the Federal Rules of Civil Procedure. In appeals from federal nonjury trials rule 52(a) prohibits review of the trial judge's findings of fact unless they are "clearly erroneous."[41] *Bose* is the first case to analyze whether independent appellate review conflicts with rule 52(a) by subjecting a trial judge's finding of actual malice to additional review.

The circuit courts' application of independent appellate review has favored publishers. Using independent appellate review, the courts of appeals have reversed approximately seventy percent of the libel judgments entered against publishers.[42] Had appellate courts not been able to implement a true actual malice standard, the national media surely would be less vigorous and competitive in bringing information to the public. This high reversal rate demonstrates the tendency of trial judges and juries to disregard the constitutional privilege accorded the press in order to reach more intuitively "fair" verdicts.[43] Were federal courts of appeals limited solely to clearly erroneous review under rule 52(a), the resulting de-

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versed because jury was not instructed on *Sullivan* rule); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967) (per curiam) (Defendant who lost right to object to West Virginia Circuit Court's failure to instruct jury under *Sullivan* standard nonetheless properly objected to sufficiency of evidence; Supreme Court exercised independent appellate review, reversed jury verdict); St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968) (Louisiana Supreme Court reversed on grounds that evidence did not meet reckless disregard standard because of misinterpretation of *Sullivan* standard); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970) (Maryland Court of Appeals utilized independent appellate review to reverse and remand for failure to meet actual malice requirement). *But see supra* note 37.

39 Circuit courts of appeals have utilized independent appellate review in more than 60 libel cases. Brief for Amicus Curiae New York Times Co. et al., at 16-17, Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949 (1984). The following constitute a representative sample: Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189 (1st Cir. 1982); Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932 (2d Cir.), *cert. denied,* 449 U.S. 839 (1980); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980); Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666 (4th Cir. 1982), *cert. denied,* 460 U.S. 1024 (1983); Gaines v. CUNA Mut. Ins. Soc'y, 681 F.2d 982 (5th Cir. 1982); Schultz v. Newsweek, Inc., 668 F.2d 911 (6th Cir. 1982); Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974); Alioto v. Cowles Communications, Inc., 623 F.2d 616 (9th Cir. 1980), *cert. denied,* 449 U.S. 1102 (1981).

40 *See supra* note 7.

41 "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

42 Brief for Amicus Curiae New York Times Co. et al., at 17, *Bose,* 104 S. Ct. 1949.

43 *See* Brill, *Redoing Libel Law,* The American Lawyer, Sept. 1984, at 110 (quoting Floyd Abrams, Esq.) ("The Bill of Rights is counter-intuitive. But jurors are intuitive.

crease in reversals of incorrect libel judgments would chill the spirited public debate that *Sullivan* was formulated to protect.[44] The resolution of the apparent conflict between rule 52(a) and the practice of independent appellate review thus determines the future of *Sullivan*'s protections for the press.

II

THE CASE—*BOSE CORP. V. CONSUMERS UNION OF UNITED STATES, INC.*

In 1970 *Consumer Reports* magazine published an unfavorable product review of the Bose 901 stereo loudspeaker system. When Consumers Union refused to publish a retraction,[45] Bose Corporation instituted a product disparagement[46] action in the federal district court for the District of Massachusetts.[47] The Court, as trier of fact, found that the statement in the article that "individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room"[48] was both false and disparaging.[49] Because Bose Corporation was a public figure,[50]

And they intuitively think they're there in a libel case to decide if a publication or network has been fair to a plaintiff.").

44 If the clearly erroneous standard is something more than a manipulable label, some appellate courts would be required to refrain from overruling trial judges when the trial judge's decision had a reasonable basis even though the appellate court might find the evidence constitutionally insufficient in its own opinion.

45 *Bose,* 104 S. Ct. at 1953.

46 Product disparagement, the tort of "injurious falsehood,"

> may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general . . . . The plaintiff must prove special damages in the form of pecuniary loss, and this necessarily requires that the falsehood be communicated to a third person . . . . The communication must play a material and substantial part in inducing others not to deal with the plaintiff, with the result that special damage, in the form of the loss of trade or other dealings, is established.

PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 11, at 967 (footnotes omitted). Product disparagement is a tort distinct from but essentially similar to libel, at least when the plaintiff corporation is considered a "public figure." *Id.* at 962, 970. *See also infra* note 50 and accompanying text.

47 Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249, 1277 (D. Mass. 1981).

48 *Id.* at 1253.

49 *Id.* at 1267-68.

50 *Id.* at 1271-74. The Supreme Court has yet to decide whether a corporation can qualify as a public figure under *Gertz* for purposes of a corporate defamation or product disparagement suit. *See supra* note 13. The Court did not reach the issue in *Bose,* noting only that the court of appeals was uncertain whether to apply the *Sullivan* rule to a claim of product disparagement arising from a critical review of a loudspeaker system. 104 S. Ct. at 1966. Notwithstanding the Supreme Court's reservations, the First Circuit actually expressed little doubt in its discussion of the issue.

> Bose acknowledged that it does not dispute . . . that the corporation is a public figure with respect to the subject matter of the CU article. Bose

a designation that Bose Corporation did not contest upon appeal,[51] the district court required Bose to satisfy the higher actual malice standard.[52]

The district court decided that because the author of the article, Arnold Seligson, was an "intelligent person,"[53] his testimony concerning what he actually meant in the article was not credible.[54] From this conclusion the Court drew the opposite inference from Seligson's testimony, that he knew that his criticism of the speakers' performance was inaccurate.[55] The district court found this knowledge to be clear and convincing proof that Seligson had harbored

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> also conceded that . . . *Sullivan* applies in this case . . . . [T]he district court analyzed both of these issues at length and we accept its conclusions for the purposes of this case.

692 F.2d at 194. The majority of lower courts and commentators have concluded that corporations can be classified as public figures; the current debate centers on whether corporations are always public figures or whether they are simply public figures for limited purposes as a result of their own voluntary conduct.

In *Bose* the district court adopted the reasoning of Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980), and Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980), in holding Bose Corporation to be a public figure for the purpose of product reviews of the Bose 901 loudspeaker system. 508 F. Supp. at 1272-73. The *Bruno & Stillman* court adopted a two-part test to determine corporate public figure status, inquiring into (1) the existence of a public controversy at the time of the statement and (2) the nature and extent of the plaintiff's participation in the controversy giving rise to the defamation. *Bruno & Stillman,* 633 F.2d at 591.

The district court found that Bose was a public figure for the purpose of the product review because it created a public controversy by designing a new speaker, extensively promoting it, and soliciting product reviews. 508 F. Supp. at 1273. This finding satisfied both prongs of the *Bruno & Stillman* test. The court also noted that Bose had access to the media and could have rebutted unfavorable reviews and that Bose had voluntarily assumed the risk of defamatory and false statements. *Id.* at 1274. Thus, the court applied *Sullivan*'s heightened standard of proof to Bose Corporation.

The district court, while noting that the previous cases involving corporations were corporate defamation actions, held that the same factors that support application of *Sullivan* to corporate defamation support its application to product disparagement actions. *Id.* at 1270-71.

A significant body of commentary has developed concerning the proper public figure test to apply to corporations under *Sullivan* and *Gertz. See, e.g.,* Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish,* 68 IOWA L. REV. 35 (1982); Note, *Defamation and the First Amendment in the Corporate Context,* 46 ALB. L. REV. 603 (1982); Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation,* 75 COLUM. L. REV. 963 (1975); Comment, *The First Amendment and the Basis of Liability in Actions for Corporate Libel and Product Disparagement,* 27 EMORY L.J. 755 (1978); Note, Bose Corporation v. Consumers Union of United States, Inc.: *Extending the* New York Times *Privilege to Product Disparagement,* 44 U. PITT. L. REV. 1039 (1983).

51 Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 194 (1st Cir. 1982).

52 *Bose,* 508 F. Supp. at 1271.

53 *Id.* at 1276.

54 *Id.* at 1277.

55 *Id. See infra* note 67 (concerning propriety of drawing opposite conclusion from disbelieved testimony).

the requisite actual malice,[56] and entered judgment against Consumers Union. Damages were assessed at a separate trial.[57]

The First Circuit reversed the district court.[58] The circuit court accepted, for purposes of the appeal, several of the district court's findings: that Bose Corporation was a public figure, that the statement in question was false, and that it was disparaging.[59] The First Circuit, however, reversed the judgment because it was unable to find clear and convincing proof that Consumers Union published the false and disparaging statement with "knowledge that it was false or with reckless disregard of whether it was false or not."[60] The court reached this conclusion by exercising what it termed an "independent . . . examin[ation of] the record to ensure that the district court [had] applied properly the governing constitutional law and that the plaintiff [had] indeed satisfied its burden of proof."[61] The First Circuit addressed only whether the evidence before the court satisfied the constitutional actual malice standard; it overruled none of the trial court's factual findings.[62]

The Supreme Court, in an opinion by Justice Stevens, sustained the reversal of the judgment against Consumers Union.[63] The Court thereby revitalized the *Sullivan* rule[64] by explicitly approving the extension of independent appellate review to federal trial court judgments.[65] After conducting its own independent appellate review of the trial court finding of actual malice, the Supreme Court agreed with the First Circuit's determination that "the record does not contain clear and convincing evidence that Seligson . . . [acted] with knowledge that [the article] contained a false statement, or with reckless disregard of the truth."[66] The Supreme Court noted that the facts of this case might have justified a reversal of the actual malice finding on the ground that it was "clearly erroneous,"[67] but

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56 *Id.*

57 Bose Corp. v. Consumers Union of United States, Inc., 529 F. Supp. 357 (D. Mass. 1981).

58 *Bose,* 692 F.2d 189 (1st Cir. 1982).

59 *Id.* at 194.

60 *Id.* at 197.

61 *Id.* at 195.

62 Although the First Circuit termed its review "de novo," *id.* at 195, the Supreme Court was careful to identify this as a misnomer because "the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual malice determination." *Bose,* 104 S. Ct. at 1967 n.31. *But see id.* at 1968 (Rehnquist, J., dissenting) (arguing appellate court engaged in de novo review). De novo review would entail appellate redetermination of the factual issues.

63 *Bose,* 104 S. Ct. at 1967.

64 *Id.* at 1963-65. *See also* Abrams, *supra* note 5, at 89, 91.

65 *See supra* note 37, and notes 38-41 and accompanying text.

66 104 S. Ct. at 1967.

67 "It may well be that in this case, the 'finding' of the District Court on the actual

the Court chose instead to affirm the practice of independent appellate review.[68] Chief Justice Burger concurred in the judgment without separate opinion.[69]

Justice Rehnquist, joined by Justice O'Connor, dissented,[70] contending that the finding of actual malice was pure historical fact, reviewable only under the "clearly erroneous" standard of rule 52(a).[71] Thus, the dissent advocated remanding the case to the First Circuit for a redetermination under rule 52(a).[72] The dissent would have limited the use of independent appellate review to state court decisions, as in the *Sullivan* case.[73] This interpretation would prohibit the use of independent appellate review by the federal courts of appeals, a practice common since the *Sullivan* decision.[74]

Justice White, dissenting separately,[75] agreed with Justice Rehnquist that the actual knowledge component of the *Sullivan* actual malice test was a question of historical fact and therefore should be reviewed under rule 52(a), but concluded that the reckless disregard component of *Sullivan* was not a question of historical fact.[76] He gave no explanation for this distinction. Presumably, the distinction arises because a finding of actual malice based on reckless disregard, unlike a finding based on actual knowledge, usually re-

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malice question could have been set aside under the clearly erroneous standard of review. . . ." *Id.* The Court implied that the First Circuit could have reversed the trial court simply because critical reviews are matters of protected opinion. *Id.* at 1955, 1967. The Court criticized the trial court for drawing a contrary conclusion from the author's disbelieved testimony. The Court stated that discredited testimony is not usually a sufficient basis for drawing the opposite conclusion. *Id.* at 1966. Additionally, the Court noted that the precision level required by the trial court could make any individual using a malapropism liable. *Id.*

68 "We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice iu a case governed by *New York Times v. Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Id.* at 1967 (footnote omitted).

69 Thus, while one of the six members of the Court joining in the judgment, Chief Justice Burger did not necessarily join in the majority's reaffirmation of *Sullivan*. The Chief Justice's lack of enthusiasm for *Sullivan* probably led him to abstain from joining the opinion. *See infra* note 128 (Chief Justice Burger's statement in *Greenmoss*).

70 *Id.* at 1967-70 (Rehnquist, J., dissenting).

71 *Id.* at 1968-70.

72 *Id.* at 1970.

73 "[*Sullivan*] came to this Court from a state court after a jury trial, and thus presented the strongest case for independent fact-finding by this Court . . . . Thus it is not surprising to me that early cases espousing the notion of independent appellate review of 'constitutional facts' . . . should have arisen out of the context of jury verdicts and that they then were perhaps only reflexively applied in other quite different contexts without further analysis." *Id.* at 1969 n.2 (Rehnquist, J., dissenting).

74 *See supra* note 39 and accompanying text.

75 104 S. Ct. at 1967 (White, J., dissenting).

76 *Id.*

quires the trier of fact to infer recklessness from circumstantial evidence. Thus, Justice White would find inferences independently reviewable under *Sullivan,* while he would review pure historical facts only under rule 52(a).[77] He agreed with Justice Rehnquist that the case should be remanded to the court of appeals for redetermination using the "clearly erroneous" standard.[78]

III
ANALYSIS

In *Pullman-Standard v. Swint*[79] the Supreme Court characterized the question of intent to discriminate as a question of fact.[80] If applied to *Bose,* the *Swint* analysis would render the actual malice determination a question of fact as well.[81] The *Bose* Court, however, correctly categorized the actual malice issue as a mixed question of law and fact.[82] Unfortunately, the *Bose* Court neither overruled nor

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77 Distinguishing the two components of the actual malice test from each other because one is based on a process of inference runs against a settled rule that findings based on inferences are equal to findings of historical fact for the purposes of rule 52(a). *See* Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of* Pullman-Standard v. Swint, 58 TUL. L. REV. 403, 413 n.48 (1983).

78 104 S. Ct. at 1967 (White, J., dissenting).

79 456 U.S. 273 (1982).

80 *Id.* at 285-90.

81 *See infra* notes 88-91 and accompanying text.

82 In discussing why independent appellate review cannot be withheld in favor of a determination of actual malice by the trier of fact, the Court stated that "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 104 S. Ct. at 1960 (citations omitted). In discussing the distinction between law and fact the Court noted that "[w]here the line is drawn varies according to the nature of the substantive law at issue." *Id.* at n.17. The Court used policy considerations to liberate the actual malice question from the pure fact category into which *Swint* would have placed it. This Note argues that the Court's tortured analysis results from its disinclination to overrule *Swint* and its inability to otherwise distinguish that case. *See infra* notes 92-98 and accompanying text. Moreover, whatever the Court's motivation, this Note contends that the *Bose* Court clearly believed the actual malice question to be a mixed question of law and fact. Indeed, the Court's own definition of mixed questions in *Swint* requires such a result. *See infra* notes 88-91 and accompanying text. Concededly, the Court desired to obscure this determination, to avoid its glaring inconsistency with *Swint.*

One commentator argues that it "becomes apparent . . . that the court in *Bose* applied the principle of independent appellate review to a finding of pure fact." Comment, *The Expanding Scope of Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice,* 36 MERCER L. REV. 711, 727 (1985). This argument is based on the belief that the actual malice finding is a question of law but that the actual knowledge component is a question of fact. *Id.* at 728. This Note, however, argues that neither the court of appeals nor the Supreme Court reviewed de novo subsidiary facts leading to a conclusion that actual malice does or does not exist. Rather, the appellate courts reweighed the aggregation of facts to see whether they equalled or exceeded the constitutional requirement of actual malice. No factual findings of the trial court were overturned. *Bose,* 104 S. Ct. at 1967. A simple review of

successfully distinguished *Swint*. *Bose* properly applies independent appellate review in the libel context. However, *Bose* proposes no workable structure for determining when independent appellate review is appropriate in other contexts. In fact, the Court's inability to explain the different treatment accorded the similar questions in *Swint* and *Bose* may result in a perception of independent appellate review as a tool of judicial favoritism.[83] The *Bose* Court could have reached the same result while at the same time evolving a coherent and defensible doctrine of independent appellate review.

A. Jurisprudence by Labels: Actual Malice in *Bose* and Intent to Discriminate in *Swint*

Two years before *Bose,* in the employment discrimination case *Pullman-Standard v. Swint,*[84] the Supreme Court held that the Fifth Circuit had erred in independently reviewing the trial court's finding that an employer had intended to discriminate.[85] The Court stated that the Fifth Circuit should have engaged in the limited review prescribed by rule 52(a) because the defendant's state of mind is a question of fact rather than a mixed question of law and fact.[86] Bose Corporation, relying primarily on the *Swint* decision, argued that a determination of actual malice is, like the issue in *Swint,* also a question of fact and that it should be reviewed under the "clearly erroneous" standard of rule 52(a).[87]

The *Swint* Court defined mixed questions as "questions in

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the facts dictated that in the aggregate the facts did not constitute culpable conduct under the constitutional rule. *Id.* at 1967 n.31. The Court clearly applied independent appellate review to a mixed question of law and fact.

Professor Bezanson would also disagree, however, arguing that "the Court was not . . . prepared to characterize the actual malice issue as one of mixed law and fact, or interpretation of accepted fact in terms of the legal standard of actual malice." Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on* Bose Corporation v. Consumers Union, 8 HAMLINE L. REV. 105, 118 (1985). This Note concedes that the Court avoided the clear statement that the actual malice determination was a mixed question because it wanted to avoid the ramifications of not following *Swint.* But this Note attempts to show why the Court acted as it did and tries to make sense of the opinion.

83 Some Court observers might argue that the Court's different treatment of *Swint* and *Bose* is the result of its preference for those exercising speech rights over those claiming discrimination injuries.

84 456 U.S. 273 (1982). *Swint* involved a suit under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982). Section 703(h) of the Act prohibits different treatment of employees through seniority programs when the employer intends to discriminate on the basis of race or color. The existence of this intent was the issue in *Swint.* 456 U.S. at 275.

85 456 U.S. at 286.

86 *Id.* at 287-88 ("That question . . . is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact.").

87 *See* Brief for Petitioner at 40-49, 70-82, *Bose,* 104 S. Ct. 1949.

which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or . . . whether the rule of law as applied to the established facts is or is not violated."[88] The issues of intent presented in *Swint* and *Bose* both qualify as mixed questions of law and fact.[89] Each inquiry centers upon the defendant's state of mind during the commission of a harmful act. In *Swint* the defendant was liable only if he possessed an intent to discriminate; proof of discrimination alone was insufficient.[90] Similarly, in *Bose* the publication of a false and defamatory statement about a public figure was insufficient to support liability without the culpable mental state of either actual knowledge or reckless disregard of the statement's falsity.[91]

The *Bose* Court made little attempt to distinguish the question of actual malice question in *Bose* from the intent to discriminate question in *Swint*. The Court did attempt to distinguish the cases on other grounds, however. The *Bose* Court noted that the actual malice determination in *Bose* implicated constitutional interests.[92] *Swint,* however, involved only statutory rights and an intent standard supplied by the statute.[93] In *Bose* the Court noted that the *Sullivan* actual malice standard was desigued to protect publishers who unintentionally harm public figures by publishing false and defamatory statements[94] and to prevent the unconstitutional chilling of speech through self-censorship.[95] The Court adopted independent appellate review to ensure that aggressive review of trial court decisions upheld the constitutional standard, thereby reducing the number of erroneous judgments.[96] Although independent appellate review

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88 456 U.S. at 289 n.19.

89 Justice Rehnquist recognized the similarity of the two questions but characterized them both as pure questions of fact. He described the actual malice determination as "a determination as to the actual subjective state of mind of a *particular* person at a *particular* time." 104 S. Ct. at 1969 n.1 (Rehnquist, J., dissenting). This analysis ignores the fact that *Swint* identified the weighing of the entire body of evidence against the legal standard as a mixed question of law and fact. *See supra* text accompanying note 88.

90 *See supra* note 84.

91 For a discussion of the content of the "knowledge" and "recklessness" requirements, see *supra* notes 23-28 and accompanying text.

92 104 S. Ct. at 1959 ("[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact . . . ."); *id.* at 1961 ("This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment . . . .").

93 *See supra* note 84.

94 *See supra* notes 23-28 and accompanying text.

95 *See supra* notes 15-18 and accompanying text.

96 It is a basic assumption in the American judicial system that appellate review generally adds to the correctness of judgments and is therefore limited only in the interest of judicial economy. This view is implicit in Justice Rehnquist's statements in favor of limiting appellate review. " '[W]e bave an obsessive concern that the result reached in a particular case be tbe right one . . . . [T]he time has come to abolish appeal as a

may conflict with rule 52(a) of the Federal Rules of Civil Procedure,[97] the constitutionally mandated *Sullivan* procedures must prevail over statutory provisions. These distinctions between the cases are important, but they do not distinguish the nature of the question in *Swint* from the nature of the question in *Bose*.

The Court reveals in a footnote that it defined identical questions differently in *Bose* and *Swint* to enforce its policy concerns.

> Where the line is drawn [between questions of fact and mixed questions of law and fact] varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.[98]

The Court, however, did not and can not successfully explain how the nature of a question can change, not according to its content, but according to what the Court's policy concerns dictate.

B. A Proposal for an Effective Doctrine: Honest Categorization of Mixed Questions and Principled Restrictions on Application of Independent Appellate Review[99]

Policy choices play a legitimate role in the allocation of addi-

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matter of right . . . .' " Resnik, *Precluding Appeals,* 70 CORNELL L. REV. 603, 605 (1985) (citing Justice Rehnquist).

97 The Court at times argues (1) that rule 52(a) and independent appellate review are inconsistent with each other and that the constitutional interest must prevail, and (2) that rule 52(a) is not violated because no factual findings were overruled. This inconsistency muddles the entire analysis. However, the Court's reluctance to admit that a broad range of mixed questions are now being miscategorized as questions of fact may explain its contradictory stances. Under the present system, the Court requires a doctrine to remove some important questions from the confines of rule 52(a). Independent appellate review serves this purpose. If mixed questions were admitted to be mixed questions, the doctrine of independent appellate review would not be needed but for reasons of judicial economy, because by definition rule 52(a) does not apply to mixed questions. One recent commentator acknowledges this contradiction in the Court's opinion, apparently feels that *Bose* makes little sense as decided, and hints that the actual malice question may indeed be a mixed question properly removed from the realm of rule 52(a). *See* Note, *Can Civil Rule 52(a) Peacefully Co-Exist with Independent Review in Actual Malice Cases?*—Bose Corp v. Consumers Union, 104 S. Ct. 1949 (1984), 60 WASH. L. REV. 503, 504, 521 (1985).

98 104 S. Ct. at 1960 n.17.

99 This Note would apply independent appellate review on an issue-by-issue basis, rather than on a case-by-case basis. In Time, Inc. v Pape, 401 U.S. 279 (1971), Justice Harlan dissented and argued against the *unprincipled* use of independent appellate review. In his dissent, Justice Harlan perceived the ramifications of independent appellate review, stating that

> [t]he step taken today, whereby this Court undertakes to judge, "on the specific facts of this case" . . . whether a jury could reasonably find [actual malice] . . . is . . . not warranted . . . . [I]t is almost impossible

tional appellate review in certain instances.[100] To establish a coherent, workable doctrine of independent appellate review, courts must honestly identify those questions that involve whether "the rule of law as applied to the established facts is or is not violated" and define these as mixed questions of law and fact not subject to the strictures of rule 52(a). This will result in removing a substantial number of questions from the "pure fact" category where they are now largely insulated from aggressive appellate review.

The unlimited application of independent appellate review to all mixed questions would admittedly do more harm than good.[101] Careful allocation of independent appellate review, however, would allow scarce appellate resources to be targeted for the areas of the law which require extra attention. Thus, the second prong of this doctrine requires that a principled analysis be made which would relegate the large majority of these newly minted mixed questions back to de facto "clearly erroneous" review. Only extraordinary cir-

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> to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional issues . . . . I fear that what [the Court has] done today may open a door that will prove difficult to close.

Id. at 293-94 (Harlan, J., dissenting). He suggested that independent appellate review be limited to the cases in which certain "unusual factors" were present. *Id.* at 294. Such a case-by-case analysis would allow the courts to engage in unprincipled independent appellate review as they do now. An issue-by-issue approach would require analysis of which substantive laws required additional expenditure of appellate resources to ensure correctness.

For an excellent treatment of the doctrine of independent appellate review, see Monaghan, *Constitutional Fact Review,* 85 COLUM. L. REV. 229 (1985). Professor Monaghan argues that "constitutional fact review" is appropriate where it is discretionary rather than mandatory and where "a careful assessment of relevant policy considerations" dictates. *Id.* at 271. He notes two primary policy considerations: (1) when the danger of systemic bias of actors in the judicial system exists, and (2) where there is a need for case-by-case development of the law. *Id.* However, Professor Monaghan disagrees on the need for independent appellate review of libel actions. "I do not see *Bose* as presenting a persuasive case for treating the first amendment differently." *Id.* at 276.

100 For a proposal that incorporates policy factors in the decision to grant or deny independent appellate review, see *infra* notes 102-07 and accompanying text.

101 Unfettered appellate review is "detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases." Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950). For general objections to expanded appellate review that overrides rule 52(a), see Nangle, *The Ever-Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?,* 59 WASH. U.L.Q. 409 (1981); Wright, *The Doubtful Omniscience of Appellate Courts,* 41 MINN. L. REV. 751, 779 (1957); Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?,* 52 ST. JOHN'S L. REV. 68 (1977).

Professor Resnik has discerued a general Supreme Court trend to limit opportunities for review in a variety of areas; *Bose* is cited as a rare counter-example of this trend. Resnik, *supra* note 96, at 604.

cumstances should qualify a mixed question of law and fact for independent appellate review.

Professor Calleros has identified several characteristics that support the application of independent appellate review to a mixed question of law and fact.[102] Professor Calleros would apply independent appellate review to

> finding[s] that requir[e] the refinement or interpretation of a legal rule in the application of that rule to findings of fact. That characteristic is presented if the historical facts are clear, and if the rule of law, although "undisputed" in its abstract formulation, is technical, uncertain, or bound up with sensitive matters of social or political policy.[103]

Under these criteria the "clearly erroneous" standard of rule 52(a) would govern the vast majority of mixed questions of law and fact that do not possess these compelling characteristics. This proposal would allow appellate courts to target certain substantive issues for extra judicial resources and would require explicit discussion of the aforementioned policy considerations, resulting in a predictable and accountable system of independent appellate review. It would also end the unseemly jurisprudence by labels which has undermined the definitions of law, fact, and mixed law and fact.

The analysis outlined above demonstrates that the *Sullivan* actual malice question warrants independent appellate review. The actual malice test produces a high error rate when applied by triers of fact[104] because of its subjective nature. Actual malice remains an uncertain standard requiring case-by-case adjudication.[105] Appellate courts have only begun to delineate its hazy contours and the inferences that judges may draw from various kinds of evidence.[106] The actual malice standard provides crucial protection for constitutional rights and encourages vigorous public discussion of political and economic issues.[107] These factors argue for the application of independent appellate review to actual malice determinations. The *Bose* Court could have reached its desired result by using a principled analysis rather than by manipulating labels. Had it done so,

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102 *See* Calleros, *supra* note 77, at 425-32.

103 *Id.* at 425.

104 *See supra* note 42 and accompanying text.

105 "[T]his Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Bose,* 104 S. Ct. at 1961.

106 The Court has recognized the difficulties inherent in delineating the contours of a complex rule of law such as the actual malice requirement. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose,* 104 S. Ct. at 1962 (footnote omitted).

107 *See supra* notes 15-19 and accompanying text.

the Court would have established a much-needed and comprehensive doctrine of independent appellate review.

IV
THE FUTURE OF LIBEL LAW AFTER *BOSE*

Without the use of independent appellate review by federal courts of appeals and the resulting extraordinary reversal rate of trial court libel judgments,[108] the current atmosphere conducive to vigorous debate would not exist.

This exceptionally high reversal rate in libel cases largely results from two common trial court errors. First, triers of fact often misapply the actual malice test by reading a "fairness" component into *Sullivan*.[109] In an attempt to rectify the harm a public figure plaintiff may sustain from the publication of a false and disparaging statement, triers of fact frequently ignore the constitutional requirement that the defendant possess a culpable mental state.[110] The resulting judgments against publishers who did not intentionally or recklessly publish the statement contravene *Sullivan*'s basic premise that the law should proscribe only purposeful defamation of public figures.[111]

Second, triers of fact violate *Sullivan* by inferring actual malice from publishers' failure to adhere to objective standards of journalistic conduct.[112] Appellate courts, however, have steadfastly refused

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108 *See supra* note 42 and accompanying text.

109 *See supra* note 43 and accompanying text.

110 *See supra* note 25 and accompanying text.

111 The Court has required that erroneous statements must be tolerated to avoid the chilling of speech. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *Sullivan*, 376 U.S. at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). "[I]n spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Id.* at 271 (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

112 Appellate courts have consistently refused to condemn expedient journalistic practices. *See, e.g.*, Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1259 (5th Cir. 1980) ("[T]he fact that Kingsley questioned two people in the office . . . shows that he made an honest effort to test his belief," even though the results of his "test" did not confirm his belief.), *cert. denied*, 452 U.S. 962 (1981); Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir.) ("Where a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth."), *cert. denied*, 434 U.S. 834 (1977); Drotzmanns v. McGraw-Hill, Inc., 500 F.2d 830, 834 (8th Cir. 1974) ("[T]he author . . . was furnished background information by a reliable source . . . . [F]ailure to investigate does not in itself establish malice."); Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 898 (3d Cir. 1969) (defendant did not act with reckless disregard for plaintiff's rights because he first checked accuracy of broadcast), *aff'd*, 403 U.S. 29 (1971). The D.C. Circuit has noted the practical limits to the amount of research and verification that can be conducted before an item goes to press. Washington Post Co. v. Keogh, 365 F.2d 965, 972

to impose any judicially-mandated journalistic standards.[113] Therefore, by requiring proof of actual malice, independent appellate review has bestowed "near-immunity from defamation judgments"[114] upon publishers.

Some commentators have argued, however, that two aspects of the *Sullivan* decision undermine the constitutional values that opinion was desigued to protect.[115] First, the subjective nature of the actual malice test led the Supreme Court, in *Herbert v. Lando,*[116] to allow extensive discovery into the editorial processes of publishers.[117] The Court rejected the argument for an absolute privilege against discovery of a journalist's thoughts, opinions, conclusions, and editorial conversations concerning an allegedly defamatory statement. The Court concluded that an absolute prohibition on the plaintiff's use of such evidence would "constitute a substantial interference with the ability of a defamation plaintiff to establish the

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(D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967). The Fifth Circuit has even held that a writer may rely on a single nonneutral source. New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966) ("[A] reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story . . . ."). In another case, the Fifth Circuit refused to hold a journalist liable when he made a false defamatory statement because his article included other accurate material. Dacey v. Florida Bar, Inc., 427 F.2d 1292, 1295 (5th Cir. 1970). The Second Circuit noted in Edwards v. National Audubon Soc'y, 556 F.2d 113, 120-21 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977), that both sides of the story at issue were elicited in good faith. Finally, the First Circuit in *Bose* acknowledged that because the writer was writing for a diverse audience and the subject matter was technical, imprecise language could easily result and should be excused. 692 F.2d 189, 197 (1st Cir. 1982).

113 For example, courts have steadfastly rejected the contention that inflammatory statements create a presumption that the publisher was aware of their probable falsity. *See Hotchner,* 551 F.2d at 913; *Rosenbloom,* 415 F.2d at 898; *Connor,* 365 F.2d at 577; *Washington Post,* 365 F.2d at 970 ("the seriousness of a charge, in itself, is not probative of recklessness"). Even a motive of hostility or vindictiveness on the part of the writer will not alone support a finding of actual malice. *See, e.g., Hotchner,* 551 F.2d at 914 ("Knowledge of an author's ill-will does not by itself prove knowledge of probable falsity [on the part of a publisher]."). Precise use of language is not required. Time, Inc. v. Johnston, 448 F.2d 378, 384 (4th Cir. 1971) ("In describing the event, he used phrases of some vividness, used them in a figurative, not literal, sense, used a form of hyperbole . . . .").

114 *See Bose,* 692 F.2d at 195 (quoting Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349, 1373 (1975)).

115 Some commentators argue that the current *Sullivan* rule fails to adequately protect press freedom when reporting events of public interest and hence call for an absolute press privilege in these areas. *See* Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of* New York Times Co. v. Sullivan, 25 ST. LOUIS U.L.J. 501, 525-33 (1981); Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "the Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 620-25 (1983). *But see* Note, *Summary Judgment in Defamation Actions: A Threat to the Substantive Rights of Public Figure Plaintiffs,* 3 CARDOZO L. REV. 105, 128-30 (1981).

116 441 U.S. 153 (1979).

117 *Id.* at 169-77.

ingredients of malice as required. . . ."[118] Some commentators argue that publishers will avoid controversial subjects to prevent discovery into sensitive editorial processes, resulting in a chilling of speech, despite *Sullivan*.[119]

Second, some commentators contend that the cost of even a successful defense against a libel suit is sufficiently high to deter speech that, although legally protected under *Sullivan*, might stimulate litigation.[120] Some believe that this cost has rendered the protections of *Sullivan* null.[121]

These two concerns arise from the deleterious effect that current civil litigation procedures have on libel actions. Critics of the extensive discovery allowed into publishers' editorial processes under *Herbert* support modification of the Federal Rules of Civil Procedure to limit the scope of discovery in libel actions.[122] Critics concerned about the high cost of a successful libel defense support modifying the doctrine of summary judgment to facilitate early termination of libel suits. These commentators would raise the burden of proof the plaintiff must satisfy to allow a libel suit to continue after the defendant has moved for summary judgment.[123]

These proposed remedies derive from the assumptions that *Sullivan* was intended to eliminate all potential chilling effects on speech concerning public figures and that special rules of civil procedure are required to protect publishers' first amendment rights. Although this analysis may have merit, the Supreme Court clearly did not intend that *Sullivan* eliminate the public figure libel ac-

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118 *Id.* at 170.

119 *See* Note, *Constitutional Law—Self-Censorship After* Herbert v. Lando: *The Need for Special Pre-Trial Procedure in Defamation Action*, 58 N.C.L. REV. 1025, 1034-36 (1980).

120 *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 430-36 (1975); Brill, *supra* note 43, at 1, 8; Del Russo, *supra* note 115, at 520; Lewis, *supra* note 115, at 609, 611-12, 619, 624; Note, *Public Figure Defamation: Preserving Summary Judgment to Protect Free Expression*, 49 FORDHAM L. REV. 112, 130-31 (1980).

121 *See* Anderson, *supra* note 120, at 437-38; Del Russo, *supra* note 115, at 525-26; Lewis, *supra* note 115, at 624-25.

122 *See* Note, *supra* note 119, at 1036-39 (suggests bifurcating discovery into two phases by allowing investigation into publishers' mental processes only after establishing falsity of statement).

123 For an excellent article on the mechanics of summary judgment, its inappropriateness in libel cases, and a proposal for modification of the existing rules, see Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707 (1984). *See also* Lewis, *supra* note 115, at 619; Note, *supra* note 120, at 120-32; Comment, *The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice*, 26 VILL. L. REV. 470, 479-98 (1981).

In an important case, the Supreme Court shall soon decide whether a plaintiff must present clear and convincing evidence in order to avoid a successful summary judgment motion for the defendant in public figure libel cases. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 2672 (1985).

tion.[124] Systemic problems with discovery and summary judgment are not peculiar to libel actions, and addressing them separately for each substantive cause of action would be unwise.[125] To exempt publishers from the inconvenience and expense of protecting their rights without providing similar relief for other defendants would be anomalous.

Creating special rules of civil procedure for libel cases under *Sullivan* could almost entirely shield publishers from libel judgments. However, the Supreme Court has clearly stated that providing publishers absolute immunity against libel suits by public figures would be "an untenable construction of the First Amendment."[126] Although the press may continue to seek absolute protection, *New York Times v. Sullivan* has greatly benefitted the fourth estate by diminishing the chill of self-censorship. Some of the Burger Court's recent decisions have eroded the outer boundaries of *Sullivan*.[127] Nonetheless, by affirming the now-common use of independent appellate review in libel cases, the Burger Court has embraced the goals of *Sullivan*'s substantive revolution.

Given the current political environment,[128] a third decade of a

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124 *See* Herbert v. Lando, 441 U.S. 153 (1979). "Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability." *Id.* at 158. "[T]he Court has reiterated its conviction . . . that the individual's interest in his reputation is . . . a basic concern." *Id.* at 169. *See also* Note, *supra* note 115, at 128-29; Note, *supra* note 119, at 1030-31, 1036.

125 *See Herbert,* 441 U.S. at 176-77.

> [M]ushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus. But until and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse. (footnote omitted).

Id. See also Calder v. Jones, 465 U.S. 783, 790-91 (1984), where the Court recently stated, "We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." (citations omitted).

126 *Herbert,* 441 U.S. at 176.

127 *See generally* Calder v. Jones, 465 U.S. 783, 790-91 (1984) (reporters subject to jurisdiction of foreign state where conduct allegedly calculated to cause injury occurred); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) (small but regular circulation of magazine in foreign state sufficient to subject publisher to jurisdiction in libel action there); *Herbert,* 441 U.S. at 169 (there is no press privilege which prevents normal discovery in libel actions).

128 A crucial battle over the practical effect of *Bose* is currently being waged in the D.C. Circuit Court of Appeals. On a motion for judgment notwithstanding the verdict, Judge Gasch overturned a jury verdict against the *Washington Post* and others. Tavoulareas v. Washington Post Co., 567 F. Supp. 651 (D.D.C. 1983). The D.C. Circuit reinstated the verdict against all but one of the defendants, reversing Judge Gasch. Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), and also denied a motion for rehearing. 763 F.2d 1472 (D.C. Cir. 1985). Upon its own motion, the D.C. Circuit, *en banc,*

viable and increasingly effective post-*Bose Sullivan* doctrine may be the best protection that the press can reasonably expect. As appellate courts continue to refine and explicitly identify the contours of the actual malice standard, trial courts should increasingly find publishers innocent of libel under *Sullivan*.[129] This development will discourage questionable libel suits[130] and relieve publishers of the heavy litigation burdens created when defendants are forced to resort to appellate courts to secure proper application of the *Sullivan* rule.[131]

A recent libel trial which resulted in the acquittal of a publisher under the actual malice standard illustrates this point. The trial judge in *Sharon v. Time, Inc.*[132] was lauded for the care and innovation with which he charged the jury on the actual malice issue.[133]

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voted to vacate the panel's decision and to rehear the case *en banc.* 763 F.2d at 1481. A decision is imminent.

For other evidence of the controversy over the role of the press, see Abrams & Cain, *Is It Time to Change the Libel Doctrine for Public Figures?,* A.B.A. J., July 1985, at 38, 38-41 (Abrams pro-*Sullivan,* Cain anti-*Sullivan*); Brill, *supra* note 43; Safire, *Free Speech v. Scalia,* N.Y. Times, Apr. 29, 1985, at A17, col. 5. *See also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2948 (1985) ("I agree with Justice White that [*Sullivan*] should be reexamined . . . . Consideration of these issues inevitably recalls the aphorism of journalism . . . 'too much checking on the facts has ruined many a good news story.' ") (Burger, C.J., concurring).

The Supreme Court has recognized the tendency of triers of fact to under-protect unpopular speech or speakers. A jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks.' " 104 S. Ct. at 1965 (citing Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971)).

129 As a clear, highly protective libel standard is enunciated by the appellate courts, trial courts are likely to begin applying the proper legal test. This should result in reaching correct judgments more often, thus obviating the need for a continuation of the 70% reversal rate.

130 A recent celebrated libel suit, Westmoreland v. CBS, Inc., No. 84-7809 (S.D.N.Y. Jan. 14, 1985), was withdrawn by the plaintiff after 18 weeks of testimony. The settlement provided only for a placatory statement by the defendant CBS; no monetary compensation was given. Plaintiff Westmoreland spent at least $2 million to bring the suit. Commentators have speculated that the suit was dropped because of the plaintiff's poor prospect for success. *See* Margolick, *Risks in Litigation: The Westmoreland and Sharon Cases Show Cost on Both Sides May Be High,* N.Y. Times, Feb. 19, 1985, at B7, col. 1; *Press Cautiously Hails Westmoreland's Withdrawal of Libel Suit,* N.Y Times, Feb. 19, 1985, at B7, col. 3.

131 In light of the cost and high reversal rate of trial court actual malice determinations, plaintiffs will likely appeal unfavorable decisions only in the most egregious cases.

132 No. 83-4660 (S.D.N.Y. Jan. 31, 1985).

133 In *Sharon* a federal jury found *Time* magazine did not act with actual malice when it published a false and defamatory statement about former Israeli Defense Minister Ariel Sharon. Judge Sofaer took great care in his jury charge to identify the separate questions and to explain the subtleties of the actual malice standard. The jury considered each question separately: first, finding that the statement at issue was defamatory, second, that it was false, but third, that *Time* did not act with actual malice in publishing the statement. Judge Sofaer devoted 20 pages of his 66 page charge to an explanation of actual malice. *See* McGrath & Stadtman, *Absence of Malice,* NEWSWEEK, Feb. 4, 1985, at 52, 54; *The Libel Law at Work,* NEWSWEEK, Feb. 4, 1985, at 55.

This charge apparently allowed the jury to appreciate fully the constitutional implications of the actual malice standard and led to an acquittal. Commentators predict that future libel trials will copy this procedure.[134] Through such increased precision at the trial level and through the check on trial courts inherent in independent appellate review, *Sullivan* effectively protects the hearty discourse that characterizes and perpetuates American democracy.

CONCLUSION

The Supreme Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.* strongly protects publishers' first amendment interests by affirming the use of independent appellate review by federal courts of appeals. The decision is especially important in light of the current political criticism of the organized media. The Court, however, could have laid a better foundation for its decision by addressing the distinction between questions of fact and mixed questions of law and fact that currently determines the application of independent appellate review. The method proposed in this Note would enable the judiciary to allocate limited appellate resources in a principled manner. Adoption of this proposal would allow the use of independent appellate review in other suitable contexts. The result would be the successful protection of other important legal rights in addition to the vital constitutional right to freedom of the press.

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134 Future libel trials will probably copy the special verdict style of the jury's deliberations required by Judge Sofaer in the *Sharon* trial to prevent juries from misunderstanding the relevant legal standard to use in reaching their verdict. *See The Libel Law at Work, supra* note 133, at 55. One commentator has posited that the withdrawal of the *Westmoreland* libel suit after 18 weeks of trial was a "belated reaction" to the prospect that presiding Judge Leval would follow Judge Sofaer in requiring the jury to reach and announce separate decisions on the issues of truthfulness, defamation, and actual malice. *See* Margolick, *supra* note 130 (summarizing remarks of Professor Blasi).