‘Bad’ News Travels Fast:
The Telegraph, Syndicated Libel, and Conceptualizing Freedom of the Press, 1890-1910

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Dedication

This dissertation is dedicated to my parents, David and Patricia File.

They have always made sure that I have what I need.

Abstract

This dissertation explores the historical implications of an unprecedented series of libel cases that arose out of false news reports spread by news wire services at the turn of the twentieth century. The industrialized speed and scale of the news industry, along with growing concern about sensationalism and the value of reputation had created tension in the press' relationship with society at the time the cases arose. The scale of the cases, in which single plaintiffs sued hundreds of newspapers for publishing the same libelous story, raised new challenges for the press and for libel law doctrine. This study argues that through the serial libel cases the press articulated a new legal conception of press freedom that called on courts to tip the analytical balance to be more protective of its social role in using the telegraph to deliver timely news to the public. Moreover, because the cases involved plaintiffs of varying social prominence, from virtually anonymous to world-famous, the cases also offer new insights into how libel plaintiffs' status and identity could influence the legal analysis of protecting reputational rights at a time before libel law prompted constitutional consideration. The study uses an interdisciplinary conceptual framework of the cultural history of journalism and critical legal history to illuminate the role of law and legal consciousness in the social process of regulating the role of journalism in a democratic society. The study examines legal discourse surrounding the cases both inside and outside of courtrooms and newsrooms, drawing on appellate opinions and legal treatises as well as newspaper and trade press coverage of the cases.

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Introduction

In early October 1892, newspapers across the United States reported a brazen theft in the nascent electric light industry. According to the story that appeared in hundreds of newspapers via the United Press Association (UPA) wire service, the Auer Incandescent Light Company had sent Pennsylvania businessman Tyndale Palmer to Brazil to negotiate the sale of patent rights for a new light bulb. The story reported that in Rio De Janeiro, Palmer sold the patent for $510,000, but told the Auer company it was sold for only $70,000, splitting the remaining $440,000 with a local hotel owner named Joao Francisco De Freitas.[1] The shocking tale of international business fraud, which passed quickly from newspaper to newspaper, city to city, and coast to coast along the telegraph wires, turned out to be a fabrication, and Palmer and De Freitas proceeded to gain notoriety from newspaper publishers not as swindlers, but as libel plaintiffs, as they launched what trade publication the *Fourth Estate* described as "the greatest libel syndicate of the age."[2] Over the next ten years, Palmer sued hundreds of newspapers all over the country for printing the false allegations. In some instances De Freitas filed tandem suits alongside Palmer. The targets included a paper in Palmer's hometown of Youngstown, Ohio, the *Vindicator*, as well as big city papers like the St. Louis *Post-*

[1] See, for example, "A Big Theft Discovered," Pittsburgh *Dispatch* Oct. 2, 1892; "Theft of More than Four Hundred Thousand Dollars," St. Paul *Daily Globe* Oct. 3, 1892; "Palmer a Youngstown Man," Pittsburgh *Dispatch* Oct. 3, 1892.
[2] "The Past Year," *Fourth Estate*, Jan. 6, 1898.

Dispatch and New York *Daily News* and small town ones like the *Republican* of Winona, Minnesota and the *Constitution* of Keokuk, Iowa.[3]

Palmer was probably the most prolific libel plaintiff of the nineteenth century, but his legal crusade was not entirely unique. In 1890 prominent socialites Juliette Smith and Edward Rutherford launched a series of libel lawsuits following a syndicated report that Smith had left her husband in Toronto, Canada in order to run off with Rutherford. The story, also disseminated via UPA dispatch, had appeared in the New York *Evening Sun* under the headline "Did She Go with a Handsomer Man? Reported Sensational Elopement in Canadian High Life."[4] The Smith and Rutherford suits spanned eight years and targeted newspapers in New England and Chicago. Another serial libel plaintiff—probably the most prominent—was Annie Butler, better known as world-famous trick shooter "Annie Oakley," who by 1903 was approaching the twilight of her career as a performer with Buffalo Bill Cody's Wild West Show. Late in the summer of that year, the Chicago *Tribune* reported that she had turned up in a Chicago courtroom accused of stealing a man's pants in order to buy cocaine. Soon the story was syndicated around the country via the Publisher's Press Association (PPA) wire service. The accused woman turned out to be an imposter Oakley; one of at least two other women who had toured the

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[3] See "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22 1897, p. 1. The exact number of Palmer and De Freitas libel lawsuits has been difficult to establish; "hundreds" is probably as accurate an estimate as possible. The trade paper *Fourth Estate* solicited information from its readers on the cases; the list it published July 22, 1897 included 47, 40 of which were filed by Palmer and seven by De Freitas. Other reports at the time ranged from 126, in the *Republican* of Winona, Minnesota on October 6, 1894, to 300, in the Chicago *Daily Tribune* on October 5, 1893. The *Fourth Estate* speculated in November 1898, "when he has concluded his litigations he will have sued 600 daily newspapers." "Note and Comment," *Fourth Estate*, Nov. 24, 1898, p. 6.

[4] Smith v. Sun Printing & Pub. Asso., 55 F. 240 (2d Cir. N.Y. 1893).

country claiming to be the famous crack shot and who, unlike Butler, had fallen on hard times.[5] Between 1903 and 1907, the real Annie Oakley—Annie Butler—sued dozens of newspapers from New Jersey to Kansas for printing the story.[6]

In each of these serial libel cases, "bad" news—a report that was inaccurate and placed its subject in a negative light, thus exposing its publishers to legal liability under a doctrine that disfavored speech with the "bad tendency" to do harm to the public welfare by harming an individual's reputation—traveled almost instantly via telegraph wire to newspapers around the country, which published it as quickly as possible as part of their regular business routines.[7] The plaintiffs employed a long established legal action that

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[5] The identity of the woman arrested in Chicago has not been entirely settled by historians. She was most likely either Maude Fontenella, a vaudeville actress who had performed in a burlesque Wild West show under the name "Any Oakley," or Lillian Cody, the wife of Samuel F. Cody, proprietor of a lesser "Wild West" show and no relation to Buffalo Bill Cody. Lillian Cody performed in her husband's show as a rifle and pistol trick shooter under the name "Any O'Klay." See Shirl Kasper, *Annie Oakley*, (Norman, Okla.: University of Oklahoma Press, 1992): 174; Glenda Riley, *The Life and Legacy of Annie Oakley*, (Norman, Okla: University of Oklahoma Press, 1994): 77; and Thomas Julin and D. Patricia Wallace, "Who's that Crack-Shot Trouser Thief?" *Litigation* vol. 28, no. 4, (2002): 49-67, 50.

[6] Louis Stotesbury, "The Famous 'Annie Oakley' Libel Suits," *The American Printer*, vol. 40, no. 6, p. 533, 584-5 (Aug. 1905); see also Julin and Wallace, "Who's that Crack-Shot Trouser Thief?"; Kasper, *Annie Oakley*, 173-180; Riley, *The Life and Legacy of Annie Oakley*, 76-83.

[7] The "bad tendency" test was "the most pervasive and fundamental judicial approach to free speech issues between the Civil War and World War I," according to David Rabban in his landmark study, *Free Speech in its Forgotten Years* (New York: Cambridge University Press, 1997): 132. The test was derived from Sir William Blackstone's eighteenth century theory that the legal right to free speech and press precluded prior restraint, but permitted punishment where speech has a tendency to harm the public welfare. The term "bad" news is used here to connote a comparison to the bad tendency test in order to help us consider how social actors and institutions determined what types of news reporting were acceptable and likely to produce "good" news, and that which were not acceptable and likely to produce "bad" news. To the author's knowledge, "bad"

could allow them to recover monetary damages in compensation for the harm, but they did so on a scale never seen before, suing newspapers in cities and towns that they might not have ever visited. In most of the cases, the defendant newspaper publishers claimed they were not aware that the stories were allegedly false until a correction came to them through the wire service, or the plaintiff notified them by letter or telegram, or they were summoned to court to defend their publication. Many of the newspapers printed retractions and issued apologies, but editors and publishers also used their pages to defend themselves in the court of public opinion and discussed and debated the cases and their implications for the broader concern of libel law in their burgeoning professional trade press.

In court, journalists argued that the juries and judges who assessed liability for libelous mistakes should take into account the ways in which modern newspapers served the public. The cases raised complicated questions about whether there were circumstances in which the publication of "bad" news could be excused or defended, and how plaintiffs should be compensated if they were scorned or spurned by the public or their ability to make an income was inhibited. Jurors and judges considered whether the damages they awarded should merely compensate a specific and measurable loss or whether it should also be used to punish the newspaper, making an example of it for publishing false and personally embarrassing reports. The implications for the cases were hardly abstract. Newspapers accused of publishing "bad" news faced the prospect of costly legal battles that raised doubts about the trustworthiness of a system that had

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news was not specifically used at the turn of the nineteenth century in the way it is used here.

become an integral part of American news reporting. Plaintiffs employing libel suits to protect their reputations and privacy took financial risks of their own and tended to draw even more unwanted attention. And the judges and jurors empowered with deciding the cases' outcomes could imagine themselves appearing in the pages of the newspaper one day, too, and were conscious of the fact that their decisions and opinions could shape the way news was gathered and reported.

The serial libel cases provide a window into an important and formative confrontation with problems created by the industrialization of news in a democratic society at the turn of the twentieth century. The increasing speed and technical complexity with which news was shared around the country held promise as well as peril, and the law played a critical role in the distribution of the benefits and burdens of the technology. The dozens of lawsuits that Smith, Rutherford, Palmer, De Freitas, and Butler pursued around the country between 1890 and 1910 prompted new questions about whether the harm done by a libel could be diluted by decentralization and whether the telegraph should change the fault-finding analysis when an individual's reputation was harmed by a false report shared by a wire service. Moreover, the cases placed evolving ideas about press freedom, reputation, and privacy in direct tension with each other, forcing a reconsideration of the rights and responsibilities of the press that informs ongoing debates in American society about the purposes and limits of "freedom of speech" and "freedom of the press."[8]

[8] U.S. Const. amend. I; in pertinent part: "Congress shall make no law… abridging the freedom of speech, or of the press."

The common thread weaving together the serial libel cases was the telegraph, a technological innovation that capped a communications and transportation revolution that took place between 1815 and 1848, helping to revolutionize mass communication and transform American social consciousness in the second half of the nineteenth century.[9] Newspapers adopted telegraphic technology as a means to quickly share news across the country soon after Samuel F.B. Morse inaugurated the first line between Washington, D.C. and Baltimore in 1844 with the words "what hath god wrought."[10] The telegraph, *New York Herald* editor and publisher James Gordon Bennett claimed in 1855, was a powerful instrument helping to mold "the public mind," saying of its influence, "the whole nation is impressed with the same ideas at the moment. One feeling and one impulse are thus created and maintained from the center of the land to its uttermost extremities."[11] Over the course of the second half of the nineteenth century, the telegraph

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[9] See Richard John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, Mass.: Harvard University Press, 1996), arguing that the postal system helped to begin to formulate a national society between 1777 and 1844; Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), arguing that the telegraph helped solidify an American national identity; James Carey, *Communication as Culture: Essays on Media and Society*, (London: Unwin Hyman, 1989) and Carey, "The Communications Revolution and the Professional Communicator," *The Sociological Review Monograph*, no. 13, (1969): 23-38, arguing that the importance of the telegraph is rooted in its completely decoupling communication from transportation for the first time in human history, rearranging and reorienting the American ideological landscape and "alter[ing] the way time and space were understood;" Daniel Czitrom, *Media and the American Mind from Morse to McLuhan* (Chapel Hill: University of North Carolina Press, 1982), noting the contradictions between the promise for widespread social good offered by the telegraph and the outcomes.

[10] See Howe, *What Hath God Wrought*, 1-4.

[11] Isaac C. Pray, *Memoirs of James G. Bennett and His Times* (New York: Stringer and Townsend, 1855): 363-4. Bennett also predicted that the rise of the telegraph would mean

helped change nearly everything about the *modus operandi* of American newspapers, from the writing style of reporters to the structure of the growing news and information business.[12] Meanwhile, faster and more efficient communication joined with greater geographical and social mobility, leading to both the emergence of a sense of national identity as well as greater awareness of the importance of individual reputational information.[13] As millions of American immigrants poured into the country's new cities and spread out along its growing network of roads and rails, they relied heavily on the social "currency" of reputation as they sought better work, credit, and to improve or maintain their social status.[14]

By the late 1800s, however, the optimism that the telegraph would connect Americans far and wide in a great national discussion of issues of importance and consequence had grown tarnished. Hopes for the rise of a Brotherhood of Man and the end of isolation brought on by universal communication had been met with a Civil War,

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the demise of the newspaper. Tom Standage, *The Victorian Internet* (New York: Walker Publishing Co., 1998): 149.

[12] Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978); Standage, *The Victorian Internet*; Paul Starr, *The Creation of Mass Media: Political Origins of Modern Communications* (New York: Basic Books, 2005): 153-189; Susan Broker-Gross, "Nineteenth-Century News Definitions and Wire Service Usage," *Journalism Quarterly* vol. 60, no. 1 (1983): 25-26; Richard John, *Spreading the News*; Richard John, *Network Nation: Inventing American Telecommunications* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010); Menahem Blondheim, *News over the Wires: The Telegraph and the Flow of Public Information in America, 1844–1897* (Cambridge: Harvard University Press, 1994); Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (New York: Alfred A. Knopf, 2010).

[13] See Howe, *What Hath God Wrought* and Lawrence Friedman, *Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy* (Stanford: Stanford University Press, 2007).

[14] Friedman, *Guarding Life's Dark Secrets*, 7, 27-30.

economic instability, and the steady consolidation of wealth and power in large corporations.[15] In crowded and growing American cities, the telegraph and modern newspapers were seen as "both symptom and cause of the increasingly frantic pace of industrial life."[16] Moreover, critics assailed the debasing influence of the modern daily newspaper's tendency toward crime and scandal, which had transformed it from a "periodical expression of the thought of the time, the opportune record of the questions and answers of contemporary life, into an agency for collecting, condensing, and assimilating the trivialities of the entire human existence."[17]

Calls for reform in the press joined an ongoing debate among journalists about the professional status of the field: its shared goals and values, its increasingly complex institutional organization and structure, and the ways those elements distinguished members of the trade from ordinary people or members of other professions.[18] At the end

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[15] Czitrom, *Media and the American Mind*, 18-21; Carey, *Communication as Culture*, 206-209; Howe, *What Hath God Wrought*, 1-7, 690-698.

[16] Czitrom, *Media and the American Mind*, 20. Neurologist George Beard blamed the telegraph for nervousness. Beard, *American Nervousness*, (New York: G.P Putnam's Sons, 1881).

[17] W.J. Stillman, "Journalism and Literature," *Atlantic Monthly* 68 (November 1891): 694. See also Jeffery A. Smith, "Moral Guardians and The Origins of the Right to Privacy" *Journalism and Communication Monographs* vol. 10, no. 1 (2008). Smith tracks calls for reform inside and outside of the press back to at least 1848; calling it part of a growing literature beginning to "consider and connect the multiple intellectual and cultural dimensions of the disputes over control of personal information and space" in which "religious and moral frameworks of meaning were being pitted against an emerging gospel of consumer gratification," in the years before a movement for legal recognition of a right of privacy in the 1890s.

[18] Historians and sociologists have considered a variety of factors as contributing to the professionalization of journalism, including the emergence of the "reporter" among 1830s penny papers, a Civil War-era sense of duty and distinctiveness expressed in journalists' writing about their jobs, the organization of trade groups and trade publications in the mid-to-late nineteenth century, and the rise of "objectivity" as an

of the nineteenth century, the debate about journalistic professionalism spilled from the meeting halls of press clubs and the parlors of polite society into the pages of popular magazines and the trade journals of lawyers and journalists, as well as into the courts. Consequently, questions arose about whether the press' claims of a special social role could be translated into special legal status or rights.[19]

The serial libel cases arose at a confluence of complex and contested doctrines, reflecting a larger conceptual crisis in law. Judges in the late nineteenth century worked

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organizing and guiding value. See Stephen Banning, "The Professionalization of Journalism: A Nineteenth Century Beginning," *Journalism History* vol. 24, no. 4 (1999): 157-164; Andie Tucher, "Reporting for Duty: The Bohemian Brigade, the Civil War, and the Social Construction of the Reporter" *Book History* vol. 9 (2006): 131-157; Mary M. Cronin, "Trade Press Roles in Promoting Journalistic Professionalism, 1884–1917," *Journal of Mass Media Ethics* vol. 8, no. 4 (1993): 227–238; Patrick Lee Plaisance, "A Gang of Pecksniffs Grow Up: The Evolution of Journalism Ethics Discourse in *The Journalist* and *Editor and Publisher*," *Journalism Studies* vol. 6, no. 4 (2005): 479–491; Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978): 7-9, 152-159; and Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967): 120.

[19] The literature covering this period of media law history is modest but growing. On privacy and libel, see Friedman, *Guarding Life's Dark Secrets*; Smith, "Moral Guardians and The Origins of the Right to Privacy;" and Timothy Gleason, *The Watchdog Concept: The Press and the Courts in Nineteenth Century America* (Ames: University of Iowa Press, 1990). On journalists' refusal to reveal confidential sources, see Dean Smith, *A Theory of Shield Laws: Journalists, Their Sources, and Popular Constitutionalism* (El Paso, Texas: LFB Scholarly Publishing, 2013) Thomas Kaminski, "Congress, Correspondents and Confidentiality in the 19th Century: A Preliminary Study," *Journalism History*, vol. 4, no. 3 (1977); Leigh F. Gregg, "The First Amendment in the Nineteenth Century: Journalists' Privilege and Congressional Investigations," Ph.D. Dissertation, University of Wisconsin-Madison, 1984; Robert Spellman, "Defying the Law in the Nineteenth Century: Journalistic Culture and the Source Protection Privilege," Conference paper presented at the annual meeting of the International Communication Association, New Orleans, May 27, 2004. See also David Gordon, "The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen," *Journalism Monographs*, no. 22 (February 1972) and David S. Allen, "Professionalization and the Narrative of Shield Laws: Defining Journalism and the Public Sphere," Ph.D. Dissertation, University of Minnesota, 1991.

within a "classical" paradigm of legal thought intended to clearly distinguish between public law, which dealt with government's authority over public policy matters; and private law, which dealt with protecting individuals' natural rights from interference by the state or other individuals.[20] Following the classical approach, judges upheld the rule of law by deducing from general and objective legal principles the category into which cases fit and then applying the appropriate rule.[21] However, the typical analysis for cases involving speech addressed both private rights and public policy. The standard judicial test asked whether the speech at issue had a "bad tendency" to disrupt peace and good order in society, and judicial decisions were often justified both as a protection of individual rights, such as the right to reputation, and public policy interests, such as discouraging newspapers from publishing false information about people.[22] Libel law doctrine mixed public policy and practical considerations in maintaining the social status quo. In politics, libel law served to "protect the best men"—"the most virtuous, wise, and talented men of the community"—from mean-spirited attacks that would drive them out of democratic politics.[23] Cases involving nonpublic, nonpolitical individuals served to maintain a tenuous balance of social class lines by defining appropriate behavior in

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[20] Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy,* (New York: Oxford University Press): 10-11; Elizabeth Mensch, "The History of Mainstream Legal Thought," in David Kairys, ed. *The Politics of Law: A Progressive Critique*, 3rd ed. (New York: Basic Books, 1998); Rabban, *Free Speech in its Forgotten Years*, 196, 197, 201-204.
[21] Horwitz, *The Transformation of American Law*, 3-5.
[22] Rabban, *Free Speech in its Forgotten Years*, 132-146; Norman Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill: University of North Carolina Press, 1986): 13-15, 204-206, 125-129.
[23] Rosenberg, *Protecting the Best Men*, 10-11.

bourgeois society while also protecting the reputations of respectable community members.[24]

The bad tendency test for free speech issues was derived from the eighteenth century thinking of Sir William Blackstone, who argued that such freedom required that government not be permitted to restrain or restrict speech before it is spoken or published, but that post publication sanctions were not a violation of rights. "Every freeman has an undoubted right to lay what sentiments he pleases before the public," Blackstone declared in *Commentaries on the Laws of England*, "but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."[25] Libel cases were thought not to require, and usually did not receive, direct or explicit judicial consideration of their implications for state or federal constitutional protections for freedom of speech or press. Courts and litigants often assumed the existence of those guarantees without directly addressing or elaborating on them. Moreover, because speech adjudged to have a bad tendency to disrupt social order was

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[24] Friedman, *Guarding Life's Dark Secrets*, 13.

[25] Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols., ed. William Carey Jones (London, 1765-69; reprint, San Francisco: Bancroft-Whitney, 1916) book 4, ch. 11: 152. According to Leonard Levy, Blackstone was "the oracle of the common law in the minds of the American Framers," and his formulation of the limits of freedom of the press "gripped American thinking" on the subject. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985): 12, 247; Rabban, *Free Speech in its Forgotten Years*, 132. According to Rosenberg, however, a closer look at "the broader legal culture" shows that the Blackstone formulation was pervasive, but not as much as Levy maintains: "[D]uring the last quarter of the eighteenth century, numerous Americans flatly rejected the Blackstonian premises that freedom of the press meant merely the absence of prepublication restraints and that any criticism of government and public officials carried criminal liability." Rosenberg, *Protecting the Best Men*, 53-54. See also Jeffery Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (New York: Oxford University Press, 1988): 62-63.

considered to be abusive of the rights of freedom of speech and press, it qualified as a violation of the duty to use the freedom responsibly, disqualifying it from constitutional protection.[26]

The bad tendency test was employed in "in an enormous variety of contexts" related to free speech throughout the nineteenth century.[27] In libel law, its application virtually amounted to a "strict liability" standard, operating as a legal assumption that the publication of false statements about individuals could not be excused or explained and

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[26] The U.S. Supreme Court's only late-nineteenth-century explanation of the Blackstonian rationale for excluding libel from constitutional consideration appeared in dicta in Robertson v. Baldwin, 165 U.S. 275 (1897), a 13th Amendment case involving a *habeas corpus* claim: "In incorporating [the Bill of Rights] into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, [for example,] the freedom of speech and of the press … does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation." See Rosenberg, *Protecting the Best Men*, 195-6 and Rabban, *Free Speech in its Forgotten Years*, 164. According to Margaret Blanchard, as the original thirteen states drafted constitutions following the Revolution, and as more states were established, and even as Confederate states drafted new constitutions as a condition of their readmission to the union during reconstruction, the language protecting freedom of speech coalesced around a standard similar to that of New York: that "every citizen may freely speak, write, and publish his sentiments on all subject, *being responsible for the abuse of that right*; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." (Emphasis added.) Even in the few states where the constitutions did not include a responsibility clause, such as Pennsylvania, courts read them in anyway. Margaret A. Blanchard, "Filling in the Void: Free Speech and the Press in State Courts prior to Gitlow," In Bill F. Chamberlin and Charlene J. Brown (Eds.), *The First Amendment Reconsidered: New Perspectives in the Meaning of Freedom Speech and Press* (New York: Longman, 1982): 18-20, citing Respublica v. Oswald, 1 Dall. (Pa.) 319, 325 (1788).

[27] David Rabban, *Free Speech in its Forgotten Years*, 1-2. Scholars have studied nineteenth century free speech issues in criminal and civil libel cases, the abolitionist movement, sexual radicalism, and labor activism. See also Blanchard, "Filling in the Void;" Donna Lee Dickerson, *The Course of Tolerance: Freedom of the Press in Nineteenth-Century America* (Westport, Conn: Greenwood Press, 1990); Gleason, *The Watchdog Concept*; Rosenberg, *Protecting the Best Men*.

was harmful on its face.[28] Discussions of publisher fault or malice were relevant only in circumstances involving good faith reporting on government actions or debate on political matters; otherwise their relevance was limited to mitigating the monetary damages a defendant owed to a plaintiff. The bad tendency libel doctrine stands in sharp contrast to that which developed after the landmark 1964 U.S. Supreme Court case *New York Times v. Sullivan*, where the court articulated a theory of fundamental, First Amendment-based protection for the press from libel suits in matters of public interest.[29]

The serial libel cases reflected and informed fundamental conceptual challenges in separating public law and private law in the classical legal paradigm. Moreover, they played a formative role in a social debate about the professional standards of journalism at the turn of the twentieth century, illustrating the potential legal peril the telegraph helped bring to a newspaper industry business model increasingly focused on speed and scale as well as sensationalism and scandal. The central purpose here is to explore key aspects of the way, as historian Paul Starr has said, "the advent of the telegraph posed new problems for which nineteenth-century American thought and institutions were unprepared."[30] This study explores that contention by considering the extent to which the problems the telegraph posed for society were legal ones and by explaining how legal and

[28] Rosenberg, *Protecting the Best Men*, 133.
[29] *New York Times v. Sullivan* 376 U.S. 254 (1964). The doctrinal details of nineteenth century libel law are discussed in depth in Chapter II.
[30] Paul Starr, *The Creation of Mass Media*, 188.

journalistic actors and institutions responded to those problems in ways intended to define and regulate acceptable news reporting practices.[31]

Both journalism history and legal history offer useful conceptual lenses through which to interpret and understand the historical significance of the serial libel cases. The study of history has benefited from fundamental epistemological and methodological challenges—often referred to as the "cultural turn"—which have led historians to consider the social experiences and cultural practices of ordinary people in helping to explain the causes and effects of change and stasis over time.[32] Broadly speaking, the historiographical theories and methods that emerged from the cultural turn have illuminated the development of social structures and consciousness, from the bottom up and from the outside in, by encouraging the examination of the behaviors of groups and actors involved in the rise and fall of institutions, practices, and ideas along with written records that interpret the meaning and significance of those behaviors. This study draws on conceptual and theoretical views of the history of journalism and law that consider both to be socially constructed, contingent, and constitutive. Both journalism and law are best understood as created and maintained by society: they consist of institutions and

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[31] The problems may have been new but the process was not. Throughout its history, American society has used the law to define and regulate acceptable journalistic practices, from the criminal prosecution and jury's acquittal of John Peter Zenger in 1735 to present-day debates about whether an evidentiary privilege reserved for journalists should extend to non-traditional online publishers like bloggers.

[32] Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (Cambridge: Cambridge University Press, 1988) is a widely acclaimed and frequently cited account of the impact of the cultural turn on the study of history. Novick described the cultural turn as a late-twentieth-century postmodern assault on the belief that science and scholarship can reveal "a determinate and unitary truth about the physical or social world." Novick, *That Noble Dream*, 523.

paradigms of thought that are not autonomous or insulated from influence by external individuals or groups. At the same time, journalism and law, as social constructs, play a fundamental role in the creation of those social institutions and paradigms. In journalism history, such a conceptual view has demanded explaining the evolution of the process of gathering and distributing news through traditional subjects of study, like the role of newspapers and prominent publishers in political change, as well as ordinary social and cultural practices.[33] In legal history, it demands a focus that encompasses the decisions, doctrines, and dictates of legal institutions and lawmakers as well as the experiences of people outside of those institutions.[34]

The project of building a cultural history of journalism has focused largely on what James Carey called "the history of the idea of a report: its emergence among a certain group of people as a desirable form of rendering reality, its changing fortunes,

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[33] See John Nerone, "Does Journalism History Matter?" *American Journalism* vol. 28, no. 4 (2011) for a recent and critical account of journalism history's response to the cultural turn. The landmark call to create a cultural history of journalism is James Carey, "The Problem of Journalism History," *Journalism History* 1, no. 1 (1973).

[34] A 2012 symposium published by *Law and Social Inquiry* contains several excellent reviews of the development of legal history in marking the 25th anniversary of the publication of Robert Gordon's classic article "Critical Legal Histories," *Stanford Law Review* vol. 36 (1984): 57-125 in which Gordon urged legal historians to consider the indeterminacy and social contingency of law. See Hendrik Hartog, "Introduction to Symposium on 'Critical Legal Histories': Robert W. Gordon. 1984. Critical Legal Histories. 'Stanford Law Review' 36: 57-125, *Law & Social Inquiry* vol. 37, no. 1 (Winter 2012): 147-154; Christopher Tomlins,"What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon's 'Critical Legal Histories,'" *Law & Social Inquiry* vol. 37, no. 1 (Winter 2012): 155-166; Susanna Blumenthal, "Of Mandarins, Legal Consciousness, and the Cultural Turn in U.S. Legal History: Robert Gordon. 1984. Critical Legal Histories. *Stanford Law Review* 36: 57-125" *Law and Social Inquiry* vol. 37, no. 1 (2012): 167-186; and Robert W. Gordon, "'Critical Legal Histories Revisited': A Response," *Law & Social Inquiry* vol. 37, no. 1, (Winter 2012): 200-215.

definitions and redefinitions over time."[35] For Carey, because the report is a form of cultural expression that reflects journalists' "interpretation of reality," the thinking around it is an important subject of study as an evolving, socially contingent, and influential "expression of human consciousness."[36] Carey's connection between the journalistic report and "human consciousness" is both ambiguous and compelling,[37] fitting into his broader cultural historical argument that communication should be viewed as a "ritual … directed not toward the extension of messages in space but toward the maintenance of society in time."[38] By understanding what certain groups considered to be a "desirable" representation of reality at a given time, how that idea was contested, and by whom, we can better understand how forms, practices, and technologies of journalism evolved as well as the social role that people expected those forms, practices, and technologies to play in reflecting and constructing reality. The project in this study is to examine the formulation and negotiation of the idea of a report in collective discourse surrounding the serial libel cases of 1890-1910, a formative time in the

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[35] James Carey, "The Problem of Journalism History," *Journalism History* vol. 1, no. 1 (1973): 5.
[36] Carey, "The Problem of Journalism History," 27.
[37] Michel Schudson has argued that Carey's call for a cultural history of reporting is "the most important … of all his pleas" but that "it is a matter of great difficulty to figure out just what [changes in the report] portend for 'consciousness.'" Schudson, "The Problem of Journalism History, 1996," in *James Carey: A Critical Reader,* ed. E. S. Munson and C. A. Warren (Minneapolis: University of Minnesota Press, 1997): 79–85, 80-81. Andie Tucher has written that "the very vastness and vagueness of the concept raise anxiety," and proposed "we might instead say that writing a cultural history of reporting requires us to explore the development of the most distinctive and elemental of journalistic tasks: the effort of some humans to persuade other humans they probably do not know that what they say is an acceptable (I do not specify 'accurate') representation of a world every one of them can glimpse." Tucher, "Notes on a Cultural History of Reporting," *Cultural Studies* vol. 23, no. 2 (March 2009): 290.
[38] James Carey, *Communication as Culture*, 18.

professionalization of journalism as well as in ideas about reputation and the distinction between publicity and privacy.

To the extent that the study of the social formulation and negotiation of the idea of a report is concerned with debates about the proper social role of journalism and its engagement with subjects both public and private, it is useful to consider the serial libel cases through Jürgen Habermas' concept of the "structural transformation of the public sphere."[39] Habermas argued that the nineteenth century saw the beginning of a decline in "critical-rational debate" as a means of effective democratic governance in the public sphere that was largely the result of the commercialization of news. The press, which offered the most effective means for people to become informed about their world in the nineteenth century, diluted the public sphere with content that drew readers' interest without engaging them on important matters of public policy; it "paid for the maximization of its sales with the depoliticization of its content."[40] Moreover, Habermas argued that commercialization resulted in the dissolution of formerly distinguishable lines between the private and public sphere, as the two expanded and infiltrated each other, resulting in a weakening of the public sphere's political function.[41] Habermas' account has been criticized as presenting a flawed historical picture of political participation and discussion in eighteenth and nineteenth century America.[42] However, his

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[39] Jürgen Habermas, *The Structural Transformation of the Public Sphere*, (Cambridge, Mass: The MIT Press, 1991).
[40] Habermas, *The Structural Transformation of the Public Sphere*, 169.
[41] Habermas, *The Structural Transformation of the Public Sphere*, 140.
[42] See Michael Schudson, "Was there Ever a Public Sphere? If So, When? Reflections on the American Case," and Keith Baker, "Defining the Public Sphere in Eighteenth-

conceptualization of the distinction between private and public spheres as contested arenas for mass communication, the role of commercialization in blurring the lines between those spheres, and the overall process as the subject of discussion and debate in society is helpful in framing this study's focus on the discourse surrounding the social role of newspapers amid the serial libel cases. The cases reflect the potential legal consequences of an increasingly competitive news marketplace dealing with nonpolitical affairs as well as legal discourse representing competing views of how to delineate the borders of publicity and privacy.

As much as a study of the serial libel cases can help contribute to an understanding of the gradual and ongoing processes of the social formulation and negotiation of the idea of the report, it is important to also consider the cases as part of a particular historical moment in which technology—in particular, the telegraph—prompted a convergence and clash of ideas. Carolyn Marvin argued that new communication technologies challenge existing social orders because their introduction "is a special historical occasion when patterns anchored in older media that have provided the stable currency of social exchange are reexamined, challenged, and defended." For Marvin, the historical significance of new technologies is not found in the social practices that arise around the ways the instruments themselves are used, but in the "drama" that surrounds their implementation, "in which existing groups perpetually

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Century France: Variations on a Theme by Habermas" in Craig Calhoun, ed. *Habermas and the Public Sphere* (Cambridge, Mass: The MIT Press, 1992): 143-163, 181-211.

negotiate power, authority, representation, and knowledge."[43] In other words, communication technologies are not themselves determinative of social outcomes, nor are their significance or role determined by how they are put to use. Rather, their proper role is negotiated among institutions and actors with varying interests in maintaining or challenging the existing social order. Moreover, the serial libel cases suggest that this negotiation is an ongoing process that is not settled soon after the new technologies are introduced. The telegraph had been in use as a highly organized and routinized means to share news among newspapers across the country for nearly 50 years when the serial libel cases arose; the cases were as much a product of new press practices and emerging social ideas about privacy and propriety as they were a product of the use of the telegraph by newspapers to distribute news on a wide scale.

Understanding the development of social structures and consciousness requires a deep examination of the ideas of various social actors and their success or failure in advancing interests and aims. Therefore, a cultural approach to journalism history seeks to examine mass communication through its constitutive role in society beyond the professional practices of journalists, the technologies they used, or the content they created. Law often plays a crucial role in the "drama" that arises when communication technology brings into conflict the interests and aims of groups and individuals in an existing social order. Ideas and interests are articulated and challenged in law and legal forums, often in the forms of rights, responsibilities, and duties. In a manner similar to

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[43] Carolyn Marvin, *When Old Technologies Were New: Thinking About Electric Communication in the Late Nineteenth Century* (New York: Oxford University Press, 1988): 4-5.

cultural history, critical legal history seeks to reconcile "internal" legal historical approaches, which consider legal institutions to be the socially insulated sources of legal thought appropriate for the study of evolving legal practices or doctrine, and "external" approaches, which are concerned with the social effects of legal practices or doctrine found outside of legal institutions.[44] In a landmark essay calling on legal historians to embrace the indeterminacy and social contingency of law, Robert Gordon theorized critical legal history as that which approaches an understanding of "law-in-history" that draws on sources of legal consciousness both inside and outside the "law box," leading to a better understanding of the "intellectual history of the rise and fall of paradigm structures of thought designed to mediate contradictions."[45] Through Gordon's conceptual view of law's indeterminate and contingent role in society, the serial libel cases can be understood beyond the purpose of settling disputes among parties at odds over false and defamatory reports spread around the country. A critical legal historical perspective suggests a broad inquiry into the ways the cases reflect contradicting ideas about the use of technology to expand the speed, scale, and scope of journalism and the

[44] Robert Gordon formulated the internal-external dichotomy in legal history in 1975, explaining it as having been "borrowed from T.S. Kuhn's treatments of … problems in the historiography of science." Gordon, "Introduction: J. Willard Hurst and The Common Law Tradition in American Legal Historiography," *Law and Society Review*, vol. 10, no. 11 (1975): n5 and Kuhn, "Relations between History and History of Science," *Daedalus* vol. 100 (1971): 271, 279. Calls for a more externally oriented field go back as far as the 1940s, when Daniel Boorstin called on legal scholars to abandon "legal genealogy" as an approach. Boorstin, "Tradition and Method in Legal History," *Harvard Law Review* vol. 54 (1941): 424-436.

[45] Gordon, "Introduction: J. Willard Hurst and The Common Law Tradition in American Legal Historiography," 9-14; Gordon, "Critical Legal Histories," *Stanford Law Review* vol. 36 (1984): 116.

role of libel law in defining the rights, responsibilities, and duties of the press in the public sphere.

The central historical argument here is that the press articulated a new legal conception of press freedom through the serial libel cases that called on courts to protect its social role in using the telegraph to deliver timely news to the public. Through advocacy inside and outside the courtroom, the press argued that new legal rules should be fashioned to protect its use of technology, formulating a conceptual link between technology and the role of newspapers in the public sphere at the turn of the twentieth century. By incorporating the use of technology into legal thinking about the social role of journalism, the serial libel cases tested the limits of the analytical approaches and standards traditionally applied to libel law throughout the nineteenth century and contributed to an emerging view of the press as a special social institution requiring special legal rules.

The midcentury revolution in transportation and communication that led to greater geographical and social mobility changed the way individuals thought about the need to establish and protect their reputations as chaste, honest, and virtuous. Meanwhile, the increasing speed and technical complexity with which newspapers shared news around the country toward the end of the century created significant legal pitfalls for news publishers and the subjects of their reports; “bad news” could travel anywhere that “good news” did, and just as quickly. The dozens of lawsuits that Smith, Rutherford, Palmer, De Freitas, and Butler pursued around the country arose within the context of a complex debate about the idea of a report that pivoted on conflicting views of journalistic

efficiency and propriety. The cases prompted a consideration of the balance among the values of speed, scale, and accuracy, while adding urgency to questions about whether news of personal scandal was appropriate for the public sphere.

Newspapers fighting the serial libel cases articulated legal defenses arguing that they served a vital role in society by spreading information as quickly and efficiently as possible, a role that required legal protection for their use of the telegraph despite the risk of occasional dissemination of "bad" news. Advocates of this view argued that libel plaintiffs' ability to recover damages should be limited in cases where the defendant newspaper had republished a report from a wire service or where the plaintiff had already recovered damages from other newspapers for the same libelous report. The plaintiffs and other press critics argued that new circumstances did not call for a departure from the "bad tendency" approach to libel doctrine, which made no special exceptions for the press as an institution. The "wire service defense" and "libel syndicate defense" that the defendant newspapers proposed in the serial libel cases between 1890 and 1910 mostly met skepticism and scorn from trial and appellate judges, but versions of them were eventually recognized by legislatures and courts decades later.[46]

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[46] The "wire service defense," a qualified privilege that can block a libel suit against a news organization for defamatory statements when they were received and republished from a reliable wire service, has gained judicial recognition in about half of the U.S. states since the 1930s. See Kyu Ho Youm, "The 'Wire Service' Libel Defense," *Journalism Quarterly* vol. 70 no. 3 (1993): 682-691; Jennifer Del Medico, "Are Talebearers Really as Bad as Talemakers? Rethinking Republisher Liability in an Information Age" *Fordham Urban Law Journal* vol. 31 (2004): 1409-1442; Daxton R. Stewart, "When Retweets Attack: Are Twitter Users Liable for Republishing the Defamatory Tweets of Others?" *Journalism and Mass Communication Quarterly* vol. 90, no. 2 (2013): 233-247. Primary and secondary sources cite *Layne v. Tribune Co*., 108 Fla. 177 (1933) as the first time the wire service defense was recognized. See Youm, "The

The conceptual link between technology and the role of journalism in society that emerged through the serial libel cases created tension with a doctrine that was oriented toward protecting plaintiffs' rights to reputation. Libel law in the nineteenth century often functioned as a means of protection for political and social elites, drawing boundaries around who should be subject to public scrutiny and what topics were appropriate for public discussion.[47] Newspapers' claims of a need for special protection of their use of the telegraph rested on the idea that the press was a vital and unique institution for disseminating information in the public sphere. A plaintiff's identity and social status was a key element in the process of drawing boundaries of propriety for the press in its social

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'Wire Service' Libel Defense," 683; Del Medico, "Are Talebearers Really as Bad as Talemakers?" 1415. Case law also cites *Layne* as the seminal case. See, e.g., Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348, at 370 (S.D.N.Y. 1998), Winn v. AP, 903 F. Supp. 575, at 579 (S.D.N.Y. 1995), and Brown v. Courier Herald Pub. Co., 700 F. Supp. 534, at 537 (S.D. Ga. 1988). *Layne* may have been the first time a high appellate court recognized the wire service defense as a privilege, but as this study shows, it was not "initially enunciated" or "first introduced" in that case, as federal courts have stated.
In the 1940s, courts began to recognize a "single publication rule," under which a plaintiff cannot sue the same publisher more than once for the same article and can only receive damages once for a single libelous article regardless of how often it is republished elsewhere. The single publication rule was recognized in *Hartmann v. Time, Inc.*, 166 F.2d 12 (3d Cir. 1947) cert denied 334 U.S. 838 (1948). In 1952, a Uniform Single Publication Act was drafted by the National Conference of Commissioners on Uniform State Laws in 1952, and appears in *Restatement 2d of Torts*, "Single and Multiple Publications" (Philadelphia: American Law Institute, 1977), § 577A. Most states have adopted the rule through legislation or court recognition. See Stewart, "When Retweets Attack," 237 and Sapna Kumar, "Comment: Website Libel and the Single Publication Rule," *University of Chicago Law Review* vol. 70 (2013): 639-662, at 642-643. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984) the U.S. Supreme Court noted that the rule offers "a forum for efficiently litigating all issues and damages claims arising out of a libel in a unitary proceeding, … reduces the potential serious drain of libel cases on judicial resources, [and] … serves to protect defendants from harassment resulting from multiple suits."

[47] See, e.g., Clifford Lawhorne, *Defamation and Public Officials: The Evolving Law of Libel* (Carbondale: Southern Illinois University Press, 1971); Rosenberg, *Protecting the Best Men*; and Friedman, *Guarding Life's Dark Secrets*.

role. The cases of Smith, Rutherford, Palmer, De Freitas, and Butler involved plaintiffs occupying a variety of statuses and identity roles, all non-political and along a spectrum from unknown to world-famous. Moreover, the Smith and Butler cases involved nineteenth-century social expectations that women be chaste, virtuous, and play a limited role in public life at the turn of the twentieth century, cultural assumptions which influenced the outcome of their libel cases.[48] Although technology is a central focus of this study of evolving journalistic values articulated through law, the serial libel cases also illustrate the nuanced and complex notions of social identity and status that played a key role in legal thinking about libel law's role in controlling what is appropriate for discussion in the public sphere, long before the public or private status of libel plaintiffs would take on pivotal significance in the *Sullivan* line of cases starting in the 1960s.

The serial libel cases also represent a formative moment in a long running debate about the purposes and limits of legal protections for freedom of speech and the press. The conceptual link between journalism and technology has contributed to a view of the news media as a special and important institution in democratic society requiring special legal protection, a view that has been contested as a matter of legal and political

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[48] According to Diane Borden, *Beyond Courtroom Victories: An Empirical and Historical Analysis of Women and the Law of Defamation*, Ph. D. Thesis, University of Washington, 1993, 43 of 130 reported defamation cases filed between 1897 and 1906 were brought by women. Borden argues that during this period "the courts, by compensating for the real harm to a woman's reputation, simultaneously reinforce[d] the cultural values that caused the harm in the first place." Borden found that women tended to win libel cases involving chastity or morality, which made up the vast majority of the lawsuits filed, but usually lost those involving "public-sphere roles," leading to the conclusion that law reinforced the "cultural assumption that women belong exclusively in the domestic realm and that their sexual virtue is their defining reputational trait." See also Friedman, *Guarding Life's Dark Secrets*, 49.

philosophy. A central question in the ongoing debate is whether the right of freedom of the press should be considered coextensive of the right of freedom of speech all individuals enjoy, or whether it separately and specifically protects an institution, "the press," because of a unique social role it serves in the public interest.[49] Should the rights and privileges of freedom of the press, as critic and commentator A.J. Liebling asserted in 1960, be "guaranteed only to those who own one"?[50] In recent years, technology has once again intervened with and complicated legal thinking about special rights and privileges for the press. As the Internet has enabled and empowered individuals without institutional news media affiliations to gather and publish information on a global scale, it has precipitated a new round of debate about whether the law should protect a particular social institution and destabilized the contention that "a court has little difficulty knowing a journalist when it sees one."[51] The story of the serial libel cases can provide key historical context to this ongoing debate.

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[49] Among the noteworthy arguments supporting a view of the institutional press as singled out for special protection are Justice Potter Stewart, "Or of the Press," *Hastings Law Journal* vol. 26 (1975): 631-638; Floyd Abrams, "The Press Is Different: Reflections on Justice Stewart and the Autonomous Press," *Hofstra Law Review* vol. 7 (1979): 563-594; Vincent Blasi, "The Checking Value in First Amendment Theory," *American Bar Federation Research Journal* (1977): 521-649; Frederick Schauer, "Towards an Institutional First Amendment," *Minnesota Law Review* vol. 89 (2005): 1256-1279; and Sonja R. West, "Awakening the Press Clause," *UCLA Law Review* vol. 58 (2011):1025-1070. Skeptical arguments have included David Lange, "The Speech and Press Clauses," *UCLA Law Review* vol. 23 (1975): 77-119; Anthony Lewis, "A Preferred Position for Journalism?," *Hofstra Law Review* vol.7 (1979) 595-628; and Robert Sack, "Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press," *Hofstra Law Review* vol. 7 (1979): 629-654.

[50] A.J. Liebling, "Do you Belong in Journalism?" *The New Yorker*, May 14, 1960.

[51] Abrams, "The Press Is Different," 580. For a broader overview of the legal issue and its various aspects, see Eugene Volokh, "Freedom for the Press as an Industry, or

The scope of this study is delineated by its modest aim: to explain through the serial libel cases the ways in which law and technology were intertwined to influence the social conceptualization of acceptable forms and practices of journalism between 1890 and 1910. However, I hope that the study might also further illuminate some of the broader and more ambitious historical projects in which it is intellectually situated. Much of the legal historical context for this study comes from a relatively recent burst of scholarly interest in uncovering the "forgotten years" of free expression in the nineteenth century. Important studies have argued that although courts rarely offered direct or explicit interpretations of the fundamental constitutional rights enshrined in the First Amendment or state constitutions during this period, legal thinking about free speech was prevalent in all sorts of communicative aspects of the daily lives of Americans.[52] This study can add contour lines to the map of nineteenth century media law toward a more complete depiction of the ideals surrounding the democratic value of freedom of expression. More broadly, in exploring ideas about journalism expressed in discourse surrounding a set of legal cases, this study attempts to blend intellectual, social, and cultural historical approaches while taking seriously the aims of critical legal studies. The broad topic of the evolving idea of a report as a reflection of social consciousness has drawn sustained interest and debate among journalism historians, but few studies have

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Freedom for the Press as a Technology? From the Framing to Today," *University of Pennsylvania Law Review*, vol. 160 (2011): 459-540.

[52] See Rabban, *Free Speech in its Forgotten Years*; Blanchard, "Filling in the Void;" Dickerson, *The Course of Tolerance*; Gleason, *The Watchdog Concept*; Rosenberg, *Protecting the Best Men*.

incorporated law or legal thinking in a meaningful way.[53] Both critical legal history and the cultural history of journalism can benefit from a strong interdisciplinary relationship.

The primary source material for this study reflects a historical approach that embraces the social contingency of legal thought surrounding the idea of a report. Various people and institutions involved and interested in the serial libel cases acted as dynamic, if not equally powerful, interpreters of the social role of journalism. The focus here is on discourse inside and outside of courtrooms in which judges, journalists, lawyers, and litigants reasoned through the core questions raised by the serial libel cases. Within the courts, the clearest and most consequential discourse resides in documents that legal historians call "mandarin" sources of legal thought: appellate opinions issued as the serial libel cases travelled through state and federal courts, and the legal treatises to which the appellate judges turned for doctrinal guidance along the way.[54] The legal reasoning in these mandarin sources, being "the most rationalized and elaborated legal products" related to the cases, offer "the richest artifacts" of society's legal consciousness

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[53] See Nerone, "Does Journalism History Matter?" 12-13, for a discussion of the rise of the idea of a report as a subject of study in the cultural history of journalism. An excellent recent example is Kathy Roberts Forde and Katherine A. Foss, "'The Facts—The Color!—The Facts' The Idea of a Report in American Print Culture, 1885-1910" *Book History* vol. 15 (2012). Of the relatively few major studies that make up the subfield of media law history, most have been concerned with the broader intellectual history related to freedom of speech rather than the press or journalism *per se*, or are focused primarily on ideas about press freedom contained in legal sources and less on the related professional practices and standards of journalism.

[54] Robert Gordon called appellate opinions and treatises "literature produced by the high mandarins of the legal system." In his 1984 essay, Gordon argued that mandarin sources provide a sound basis for critical legal historical work, in spite of the criticism that they do not offer a complete view of the "external" sources of influential legal thought in the society. Gordon, "Critical Legal Histories," *Stanford Law Review* vol. 36 (1984): 120-124.

in answering the questions the serial libel cases raised.[55] The "external" sources of legal consciousness related to the serial libel cases were selected with a similar rationale to the selection of "internal" sources. This study focused on criticism and commentary in the burgeoning journalism trade press, as well as in established popular periodicals, to find the most fully formed and influential discourse surrounding the tension that emerged between legal doctrine and professional standards in the serial libel cases.[56] Editors and essayists identified the tensions that the cases illuminated between the news industry and the public, proposed strategies and professional practices to avoid more of them, and offered frameworks to understand their significance for the relationship between journalism and society.

This study is based on 28 appellate opinions published between 1892 and 1907 in the Rutherford, Smith, Palmer, De Freitas and Butler cases. The appellate opinions were primarily compiled using search and cross-referencing tools in the online case databases Westlaw and LexisNexis. The names of the plaintiffs and defendants were also used as

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[55] Gordon, "Critical Legal Histories," 120. A healthy debate continues to surround the centrality of mandarin sources to critical legal history, which Gordon defended in spite of concerns the focus could threaten to distance legal history from "field-level uses of law" and forsake a more detailed understanding of the way power is acquired and used in peoples' everyday lives. See Gordon, "Critical Legal Histories," 120-124. See, for example, Tomlins,"What is Left of the Law and Society Paradigm after Critique?," 162-163, arguing that important recent work highlights the perils of accepting Gordon's assumption that a symbiotic relationship exists between "mandarin legality" and "grimy locality;" and Blumenthal, "Of Mandarins, Legal Consciousness, and the Cultural Turn in U.S. Legal History," considering the disciplinary implications of contemporary critical legal historians' "turn away from mandarin materials," and arguing that they are essential to a complete and nuanced understanding of legal consciousness.

[56] The late-nineteenth-century journalism trade press has been the basis for several key studies exploring the professional development of journalism in America. See Cronin, "Trade Press Roles in Promoting Journalistic Professionalism;" Plaisance, "A Gang of Pecksniffs Grow Up;" and Forde and Foss, "'The Facts—The Color!—The Facts."

search terms in online newspaper databases[57] and historical legal document databases[58] in order to locate additional references to the serial libel cases and their litigation. Eleven treatises and five law review articles which were referenced in appellate opinions or other secondary sources were located using Gale's Making of Modern Law treatise collection and the HeinOnline database. These sources contributed to the explanation of libel law doctrine in Chapter II. Seven trade papers were reviewed from the publication of the first issue of the *Journalist* in 1884 to 1910, with a focus on references to libel law in general and the plaintiffs and defendants in the serial libel cases in particular. Trade paper coverage could be inconsistent as the publications began publishing, stopped publishing, changed frequency, and merged with other publications during the time frame studied. A variety of formats were used, based on availability, including bound volumes,[59] microfilm,[60] and online full-text searchable databases.[61]

In addition to the appellate opinions, treatises, and trade publications, the primary source search included articles about the serial libel cases drawn from four full-text searchable historical newspaper databases covering hundreds of newspapers. The newspaper articles served to fill in contextual background for the cases and occasionally

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[57] The historical newspaper databases included Proquest's America's Historical Newspapers, The Library of Congress' Chronicling America: Historic American Newspapers, Gale/Infotrac's Nineteenth Century U.S. Newspapers, and Fold3/Ebscohost's Footnote.
[58] The historical legal document databases included Gale's Making of Modern Law treatise and primary source collections, HeinOnline.
[59] *The Fourth Estate* 1892-1910.
[60] *The Journalist* 1884-1907, *Newspaperdom* 1892-1903, *Editor and Publisher* 1901-1907.
[61] *The Inland Printer* 1889-1910, *Printer's Ink* 1892-1910, *Newspaperdom* selected issues, 1899-1900, *American Bookmaker*/*American Printer* 1890-1910.

offer accounts of trials. In some cases newspaper coverage of the serial libel cases offered a glimpse of what Gordon referred to as a "trickle-down effect"[62] as the ideas expressed in the trade press made their way into newspapers' attempts to defend themselves in the court of public opinion.

In turning to newspaper archives to fill gaps in the legal record and to examine social consciousness, an acknowledgement of bias is important where cases directly concern the press. The newspapers sued by the serial libel plaintiffs published stories about those cases, and some of them also published appeals to the court of public opinion before, during, and after their cases. Newspaper pages contained eloquent and strident arguments in favor of a free and unfettered press in the context of particular serial libel cases as well as libel law more generally. Rival newspapers also weighed in on the cases, and a careful researcher must consider the extent to which competition could influence isolated editorial opinions about journalism ethics and law as much as more fundamental beliefs about freedom of the press. It is also important to consider power dynamics at work when libel plaintiffs do not have access to the same forum as newspaper publishers. The trade press can be assumed to carry a pro-press bias, but it is not clear whether that necessarily or always means arguing in favor of particular legal outcomes that benefit newspapers, or urging professional practices that minimize the likelihood of libel suits in the first place. Advocacy for both approaches appears in the trade press coverage of the serial libel cases. In the telling of the bare facts of the serial libel cases, i.e., who won or lost, the amount of money sought and awarded, or the basic rationale of an appellate

[62] Gordon, "Critical Legal Histories," 121.

judge's opinion, the assumption here is that newspapers rarely, if ever, deliberately lied.[63] It bears mentioning, meanwhile, that the lawyers and scholars who wrote law review articles on the topic of libel, and indeed the judges who ruled on these cases, were themselves members of the elite class who often felt targeted by the press. Overall, such biases are considered part of the story told here rather than a shortcoming of the available source material. Moreover, this study does not consider the consciousness reflected in discourse within the fields of journalism and law to be representative of only the thinking of special classes that are somehow disconnected from society in general. Although publishers, journalists, lawyers, and judges possessed particular skills and knowledge and had particular interests in the cases, the consciousness reflected in their discussion of the cases—in the press and in court—are taken to represent both those particular interests as well as the broader social consciousness of which those individuals were a part.[64]

In the pages that follow, Chapters I and II explain the historical and legal context in which the serial libel cases arose, a period of growth and innovation in American journalism that created increasing tension as the professional practices of the industrialized news media clashed with the libel doctrine at a moment of conceptual instability in law. Chapters III, IV, and V discuss the case studies and their significance in

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[63] Wherever possible, newspaper or trade press coverage of an appellate opinion was not used as the sole source for that opinion.

[64] The thinking here is influenced by that of Forde and Foss in "'The Facts—The Color!—The Facts," 123-151, 125: "We argue that the producers and close observers of American print culture and industries … should not be viewed as somehow different from ordinary American readers in their ideas about journalistic reports. They, too, were readers who shared a cultural common sense, responding to the same widespread social transformations and the turn to realism and empiricism as ways of knowing and representing the world."

chronological order, starting with the Smith and Rutherford suits from 1890 to 1897, followed by the Palmer and De Freitas suits from 1892 to 1903, and finally the Butler suits from 1903 to 1907. Chapter VI, the conclusion, discusses the broader historical significance of the cases, extends the historical argument, and proposes trajectories for future research.

I.

News in the Nineteenth Century: More and Faster

The stories that led Juliette Smith, Edward Rutherford, Tyndale Palmer, Joao Francisco De Freitas, and Annie Butler to launch their nationwide libel campaigns were altogether typical of modern American newspapers at the turn of the twentieth century. On any day of any week, one could pick up a copy of the Buffalo *Illustrated Express*, New York *Sun*, Cincinnati *Post*, or virtually any newspaper in the country and read about scandalous love affairs, shady business deals, or petty crime alongside news of local politics and government. Journalism in the 1890s and 1900s was a product of intertwining changes: as the newspaper industry expanded and incorporated faster communications technology, its role in society evolved in response to competitive pressures for news that was fresher and more interesting. The legal conflicts examined in this study reflect a formative moment of tension at the intersection of an evolving modern newspaper industry and the values of personal reputation and privacy. At the core of this tension were complex questions about the role of newspapers in the public sphere related to propriety—what information should be public and why; and questions about efficiency—how speed and accuracy should be balanced in the increasingly competitive news business. The debate occurred against a backdrop of growing concern about accountability amid an increasingly complex industrialized world. In providing the historical context for the serial libel cases, this study explores the interrelationship between the evolving professional identity and the industrialization of the press.

Penny Press to Popular Press; Propriety and the Trade Press

Beginning in the 1830s, a growing, diversifying, and increasingly educated American public developed a greater appetite for news as more people moved into the industrial cities of the East, Northeast, and Midwest. The number of newspapers multiplied across the country, and the new businesses competed fiercely to meet the public's growing demand for fresh news. Declining paper prices and more efficient steam-powered cylinder printing presses allowed city newspapers to publish more pages, and to do so every day. Some publishers, especially in New York City, slashed daily prices per issue, cultivating higher circulation numbers, attracting advertisers, and giving rise to the name used to categorize them today: the "penny press." The penny press was also the country's first popular press: newspapers intended to inform, enlighten, and entertain a broad cross section of the American public rather than just moneyed and politically enfranchised elites. Publishers of the bargain papers competed for the attention of the growing daily newspaper audience while striving to keep costs down, turning away from the lengthy political essays and outdated European news that had typified American newspapers since the Revolution and toward cheap, readable content like timely local news, stories of violent crime, hoaxes, and other topics that appealed to "human interest."[65] Historian Hazel Dicken-Garcia has argued that in mid-nineteenth century

[65] General overviews of the development of the popular press are found in William E. Huntzicker, *The Popular Press, 1833-1865* (Westport, Conn.: Greenwood Press, 1999); John D. Stevens, *Sensationalism and the New York Press* (New York: Columbia University Press, 1991); Hazel Dicken-Garcia, *Journalistic Standards in Nineteenth-Century America*, (Madison: University of Wisconsin Press, 1989); John C. Nerone, "The Mythology of the Penny Press" *Critical Studies in Mass Communication*, vol. 4. no. 4 (1987): 376-405, Schudson, *Discovering the News*; and Alfred M. Lee, *The Daily*

journalism, "the stress on events, the individual perspective, and the use of drama as a lure … merged into the 'story,' a product that was marketed and sold."[66]

Journalism historians have linked the shift in journalistic focus away from political opinion and toward events to a change in the social role of the newspaper. Editors of the post-Revolution party press, relying on the financial support of political patrons and wealthy subscribers, used their columns to lecture to a finite, enfranchised, and active audience about partisan politics. But the popular press sought a broader audience with a wider interest in news and information about individuals and institutions in the local community and abroad. Over the course of the second half of the nineteenth century, fewer papers relied on financial and ideological ties to political parties because commercial advertising—tied to the growth of a consumer culture and driven by swelling circulation—offered a greater source of financial support. As revenue became circulation-driven, news became event-driven.

The stories that sold best were often those that involved the drama of crime or individual scandal. The lifestyles of the rich and famous as well as the poor and overlooked were dramatized and commodified from the early days of the penny press onward.[67] Eventually, newspapers that had shed their partisan political affiliations

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Newspaper in America: The Evolution of a Social Instrument (New York: Macmillan, 1937).

[66] Dicken-Garcia, *Journalistic Standards in Nineteenth-Century America*, 89. Dicken-Garcia argues that the penny press reflected the broader "reform movement" occurring in American politics and society, when "a celebration of the individual marked the age."

[67] Smith, "Moral Guardians," 69-70. Scandal coverage and sensationalism emerged alongside the penny press. According to Smith: "penny papers and religious publications did detective work on the furtive immoralities of the elite in the 1830s, New York's 'sporting press,' publications with names such as *Flash*, *Whip*, and *Rake*, gleefully

justified their coverage of sex, scandal, crime, corruption, and poverty as part of a new allegiance to public service, morality, and social reform.[68] In response to the post-Civil War emergence of large and impersonal corporate businesses and the cities in which they thrived, newspapers emphasized the personal, identifying individuals as positive or negative examples of cultural values, exposing moral and political corruption, and seeking to "guide middle-class residents through the anonymous perils of the metropolis."[69] Coverage of "popular scandals" in particular, epitomized by the frenzy surrounding adultery charges against the famous preacher Henry Ward Beecher in 1874 and 1875, helped the press expand the scope of its authority further into private life, acting "as the remorseless prosecution, defense, and judge in a court of public opinion."[70]

By the late nineteenth century, a complex debate about privacy, propriety, and reputation arose along with the press' changing focus and sense of purpose. Moralists, scholars, lawmakers, and journalists considered how to define and protect the rights and interests of individuals, the public, and the press. As early as 1838 James Fenimore

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covered individuals in the world of commercialized sex in the early 1840s." See Huntzicker, *The Popular Press*, 1-17; Dicken-Garcia, *Journalistic Standards*, 63-71, 82-96; Stevens, *Sensationalism and the New York Press*; 10-100.

[68] Dicken-Garcia, *Journalistic Standards*, 106-115, 155-182; Smith, "Moral Guardians" 70; Glenn Wallach, "'A Depraved Taste for Publicity:' The Press and Private Life in the Gilded Age," *American Studies* vol. 39, no. 1 (1998): 50.

[69] Wallach, "A Depraved Taste," 35.

[70] Wallach, "A Depraved Taste," 32. See also Richard Wightman Fox, *Trials of Intimacy: Love and Loss in the Beecher-Tilton Scandal*, (Chicago: University of Chicago Press, 2000). In a challenging study, Rochelle Gurstein argues that sensationalistic journalism won out over privacy in the late nineteenth century by claiming free speech required a right to tell the tales they were telling, in spite of contrary arguments for the social value of "reticence." Gurstein, *The Repeal of Reticence: America's Cultural and Legal Struggles Over Free Speech, Obscenity, Sexual Liberation, and Modern Art* (New York: Hill and Wang, 1996).

Cooper wrote that "the press tyrannizes over publick men, letters, the arts, the stage, and even over private life."[71] Cooper had personal reasons to challenge changing journalistic values: between 1837 and 1843 he launched numerous civil and criminal libel actions against newspaper editors who criticized his work.[72] But his concerns also reflect a broader unease about an increasingly powerful press industry invading individuals' personal lives and publicizing moral lapses, crime, and corruption. The debate can generally be understood as a struggle between "two hallowed principles, a right to know and a right to be left alone."[73] Those who favored greater restraint—historians have called them "moral guardians" and "the party of reticence"[74]—generally argued that the excesses of the popular press threatened domestic tranquility and debased society, while press advocates argued that newspapers raised public standards when they exposed the lowest of the low and upheld the tradition of a free press in a democratic society. The press' claims of a "special authority to enter the … realm of private life,"[75] in search of interesting, important, and popular stories in the interest of consumer gratification directly conflicted with Victorian values that prized manners and a veneer of

[71] Schudson, *Discovering the News*, 13; quoting Cooper, *The American Democrat* (Cooperstown: H & E Phinney, 1938): 131.
[72] Rosenberg, 137-140. Rosenberg called Cooper's legal crusade "unmatched" until the 1930s and 1940s, when U.S. Representative Martin Sweeney launched a chain of libel suits against the columnist Drew Pearson. This research challenges that characterization.
[73] Smith, "Moral Guardians," 67.
[74] See Smith and Gurstein, respectively.
[75] Wallach, "A Depraved Taste," 31.

respectability among the upper classes, and sparked a struggle to retain control of information about people.[76]

The debate drew new legal boundaries between privacy and publicity, as social elites' growing outrage about the press' intrusion into the domestic sphere led to a successful push for the legal recognition of a right to privacy.[77] In 1890, prominent attorneys Samuel Warren and Louis Brandeis published their famously influential call for protection of privacy by way of legal recognition of "the right to be let alone."[78] Their *Harvard Law Review* article was aimed squarely at the modern press, which they claimed was "overstepping in every direction the obvious bounds of propriety and of decency" and under whose "blighting influence … no enthusiasm can flourish, no generous impulse can survive."[79]

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[76] Friedman, *Guarding Life's Dark Secrets*, 4. According to Friedman, the late nineteenth century struggle resulted in the "Victorian compromise … a complicated network of doctrines that seemed to be designed to protect reputation and operated chiefly for the benefit of respectable men and women—people with reputations to protect."

[77] Jeffery Smith has argued that "In challenging public tastes and journalistic decisions with some success, nineteenth-century privacy advocates showed how standards of civility can be used to limit civil liberties." "Moral Guardians" 94. In contrast, Rochelle Gurstein concluded that in spite of the emergence of a legal recognition of a right to privacy at the turn of the century, the press and other First Amendment advocates defeated the party of reticence, to society's overall detriment. Gurstein, *Repeal of Reticence*.

[78] Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* vol. 4, (1890): 193-220, 193. A 2012 study found the Warren and Brandeis article to be the second most-cited American law review article of all time. Fred Shapiro and Michelle Pearse, "The Most-Cited Law Review Articles of All Time," *Michigan Law Review*, vol. 110 (2012): 1483-1520, 1489.

[79] Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* vol. 4, (1890): 193-220, 196. The right to privacy expanded quickly, at least by doctrinal standards, over the coming decades. See Smith, "Moral Guardians and The Origins of the Right to Privacy," 92 and Benjamin E. Bratman, "Brandeis and Warren's 'The Right to

Americans' heightened concerns about losing control over personal information was not just a product of more intrusive journalism or more sensational news, however. As the mid-nineteenth century transportation and communication revolution connected countryside towns to each other and to larger cities along postal roads, rail lines, and eventually telegraph lines through the middle of the nineteenth century, Americans became increasingly mobile in both geographic and social terms.[80] Millions of immigrants poured into the country while millions more—especially white males with a modicum of the liberty the country promised to all—moved around in search of better work, life, and social status in new Western settlements and in growing cities.[81] In a modernizing and merit-based society, greater mobility required greater wariness of the value of one's reputation, as it could precede you.[82] Among all classes, but particularly the middle and upper classes, the extent to which a man was seen as trustworthy often translated directly to his ability to get a job or be extended credit, especially in unfamiliar circumstances; the extent to which a woman was considered chaste or virtuous had tremendous value in a society where her role was usually limited to tending to home and family.

Journalists themselves debated whether emerging practices bolstered their allegiance to the public and authority to speak on its behalf or denigrated the profession

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Privacy' and the Birth of the Right to Privacy," *Tennessee Law Review* vol. 69 (Spring 2002): 638-44.

[80] See Howe, *What Hath God Wrought*, 1-7, 690-698.

[81] Lacy K. Ford, Jr., "Frontier Democracy: The Turner Thesis Revisited," *Journal of the Early Republic*, vol. 13 (1993): 144-163; Patricia Kelly Hall and Steven Ruggles, "'Restless in the Midst of Their Prosperity': New Evidence on the Internal Migration of Americans, 1850-2000" *Journal of American History* vol. 91 (2004): 829-846.

[82] Friedman, *Guarding Life's Dark Secrets*, 7, 27-30.

and invaded the rights of individuals subjected to unwanted publicity. One such practice, which caught on after the Civil War, was the interview. Newsmakers, especially politicians, had talked to reporters long before the interview became a part of regular journalistic practice, generally doing so out of acknowledgement that the newspaper could make or break reputations. In turn, the press honored sources' cooperation by keeping many conversations confidential, not quoting them or attributing them directly, and not probing far into their private lives.[83] The interview, however, represented a new way to make and sell a story, whereby the reporter actively pursued a source and asked questions, often indelicate ones that the source may not want to answer, knowing his or her words were likely to appear in the newspaper.[84] Critics of the practice argued that it infringed interviewees' rights. After *New York Times* reporters interviewed jailed Tammany Hall ringleaders in 1871 as part of that paper's celebrated exposure of the political machine, for example, an essayist for *Frank Leslie's Illustrated Newspaper* wrote that the reporters had gone "too far … overstepping the modesty of modern

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[83] Michael Schudson, "The Objectivity Norm in American Journalism," *Journalism* vol. 2 no. 2 (2001): 149-170, 156; Smith, "Moral Guardians," 70, 76; Wallach, "A Depraved Taste," 38.

[84] Wallach, "A Depraved Taste," 31-32; Schudson, "The Objectivity Norm," 156. The professional and ethical standards of reporter-interviewee relationships have remained controversial. *New Yorker* reporter Janet Malcolm, who famously lost a libel suit over allegedly altered and reorganized quotes in *Masson v. New Yorker*, 501 U.S. 496 (1991), stoked the professional debate in 1990 with her book *The Journalist and the Murderer*, which begins with the assertion: "Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance or loneliness, gaining their trust and betraying them without remorse." The book is a critical study of nonfiction author Joe McGinniss' relationship with convicted murderer Jeffrey McDonald, who was the subject of McGinniss' 1983 book *Fatal Vision*. See Malcolm, *The Journalist and the Murderer* (New York: Knopf, 1990): 1.

reporting." The interview violated one of "the 'inalienable rights' of man not enumerated in the Declaration of Independence … the right of privacy," and the paper should also have been more respectful of the men's reputations: "so much the more should they be permitted to keep that little without having even it interviewed away from them."[85]

By the late 1890s, American newspaper publishers were engaged in what press historian W. Joseph Campbell has called a "clash of paradigms" among three approaches to telling and selling news stories, practiced by three of the most popular New York City papers. A "detached, impartial, fact-based" approach was led by the *New York Times* under its new motto, "All the News That's Fit to Print;" a more activist and flamboyant approach, widely derided as "yellow journalism," was extolled and perfected by the New York *Journal*'s William Randolph Hearst; and a narrative, literary approach was pioneered by Lincoln Steffens as editor of the New York *Commercial Advertiser*.[86] The different approaches represented various sides of a developing journalistic identity, built on the public-service ethic that emerged as newspapers became politically independent beginning in the mid-nineteenth century but also reflecting progressive and reform ideals

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[85] "Interviewing Extraordinary," *Frank Leslie's Illustrated Newspaper*, December 9, 1871; Wallach, "A Depraved Taste," 37; Smith, "Moral Guardians," 80. Ironically, if a reporter had been sent to interview Juliette Smith and Edward Rutherford about their supposed American elopement in 1890, or Tyndale Palmer and J.F. De Freitas about their alleged Brazilian embezzlement scheme in 1892, the false stories might have been debunked and the subsequent legal battles avoided. However, an interview was not necessarily a failsafe method of uncovering the truth. In 1903, Chicago *American* reporter George Pratt interviewed the woman in a Chicago jail who claimed to be Annie Oakley, but came away satisfied that the woman was in fact the famous entertainer and produced a story that reported as much. See Louis Stotesbury, "The Famous 'Annie Oakley' Libel Suits," *The American Printer*, vol. 40, no. 6, (Aug. 1905): 533, 584-5

[86] W. Joseph Campbell, *The Year that Defined American Journalism: 1897 and the Clash of Paradigms* (New York: Routledge, 2006): 70, 69-117.

of social responsibility and scientific methodology.[87] "Reporters in the 1890s," Michael Schudson has argued, "saw themselves, in part, as scientists uncovering the economic and political facts of industrial life more boldly, more clearly, and more 'realistically' than anyone had done before."[88]

Amid the push for professionalization embodied by the collective identity of shared values and public purpose, yet another symbol of professionalization: journalists' trade publications, emerged in the 1880s and 1890s, promptly joining the debate about propriety, privacy, and reputation. *The Journalist*, the first such publication, was launched in New York in March of 1884, later to be joined by *Newspaperdom* (1892), *The Fourth Estate* (1894), and *Editor and Publisher* (1901), among others.[89] The trade papers offered forums for the discussion and formation of ethical standards with regard to

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[87] Plaisance, "A Gang of Pecksniffs," 481, citing Richard Kaplan, *Politics and the American Press: the rise of objectivity, 1865-1920*, (Cambridge: Cambridge University Press, 2002); see also Schudson, "The Objectivity Norm." The process of professionalization in journalism has been somewhat contested in the historical literature. Robert Wiebe argued that American journalists joined other groups like teachers, doctors, and lawyers in the push for professionalization in the early 1900s through the adoption of specialized education and attempts to shed negative stereotypes of earlier generations. Wiebe, *The Search for Order: 1877 1920* (New York: Hill and Wang: 1967): 120. Others have argued that the process began earlier. Stephen Banning, for example, argued that the formation of early trade groups with collective aims in the mid-1800s constituted a professional consciousness. Banning, Stephen A. "The Professionalization of Journalism: A Nineteenth Century Beginning," *Journalism History* vol. 24, no. 4 (1999): 157-164. Andie Tucher has argued that the collective sense of purpose expressed by Civil War reporters was indicative of professionalism. Tucher, "Reporting for Duty," 131-157

[88] Schudson, *Discovering the News*, 71.

[89] Research for this study also included *The Inland Printer*, 1883; *Printer's Ink*, 1888; and *The American Printer*, 1890. Magazine historian Frank Luther Mott called the *Journalist* "an invaluable record of the newspaper events and personalities" of the 1880s and 1890s. According to Mott, *Editor and Publisher* eventually absorbed many of the journalism trade periodicals, including the *Fourth Estate, Newspaperdom,* and the *Journalist*. See Frank Luther Mott, *A History of American Magazines, 1885-1905* (Cambridge, Mass.: Belknap Press, 1957): 142, 243.

the limits of covering scandals and personal lives, although they did not necessarily offer commentary that was consistent or even always coherent. Editorials and essays represented a variety of viewpoints on journalistic behavior and content that did or did not belong in the profession. In the March 1894 edition, editors decried "the sneak reporter and his methods," which they said were the subject of condemnation from both the public and the press. News which "in the getting requires departure from straightforward and above-board methods consistent with frank manhood or honest womanhood, is, in the long run detrimental to the newspaper that stoops to use it," the paper declared.[90] The front page of the April 9, 1896 edition featured a reprinted *Scribner's* magazine essay by Aline Gorren entitled "Ethics of Modern Journalism." Gorren argued that the press failed to provide Americans with the vital information needed to live and thrive in a complex world full of equal opportunity, devoting too much space to "various forms of personal gossip" and, she argued, falsely promoting the idea that "in publicity, [there is] for the mass of mankind … enormous power for compelling righteousness."[91] In a response on page six of the same issue, *Newspaperdom*'s editors criticized Gorren's essay as "a curious jumble of chaotic suggestions," and called her view of the press "rather stale" and "overworked."[92]

A few weeks later, however, *Newspaperdom* editors labeled an essay criticizing "muck-rake journalism" "a strong arraignment of a too common type of newspaper." The

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[90] "News in its Best Sense," *Newspaperdom*, March 1894, p. 426.
[91] "The Ethics of Modern Journalism," *Newspaperdom*, April 9, 1896, p.1.
[92] "The Ethics of Modern Journalism," *Newspaperdom*, April 9, 1896, p. 6; see also "Papers and Private Life," *Newspaperdom*, May 28, 1896, p. 6, regretting newspaper interest in private lives, but also blaming "the public's appetite for that sort of thing."

essay, originally published in the St. Louis *Observer*, argued that journalists' claims that "what the Lord permits to happen the newspaper should not be too good to print," were a great "sophism," as "every decent man and woman knows that there are some subjects which are never discussed in respectable society. … The newspaper claims the right to be nasty, and still be regarded as decent and respectable," even as editors and publishers "take up street gossip and fling it to the winds, all for the sake of gratifying the vitiated taste which they themselves have created and cultivated." Such journalism "can put up no excuse for its sins that will bear the test of reason and sound morality."[93] Ten years later, the term "muckrake" was famously adopted by President Theodore Roosevelt in a 1906 speech comparing reform-minded investigative journalists like Lincoln Steffens, Upton Sinclair, and Ida Tarbell to "the man with the muck rake" in John Bunyan's seventeenth century story *Pilgrim's Progress*.[94]

The trade papers also weighed in on legal concerns raised by the expanding and evolving social role of the newspaper. They criticized prolific libel plaintiffs like Tyndale Palmer[95] or Annie Butler,[96] often in the context of broader concerns about the need to

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[93] "Muck–rake Journalism," *Newspaperdom*, April 30, 1896, p 2. Reprinted from the St. Louis *Observer*.

[94] Roosevelt is often credited with associating the term with journalism, but the 1896 essay shows that it was in use at least ten years earlier. The story, and the influential style of investigative journalism the term came to be associated with, is familiar to students of journalism history. See Michael Emery, Edwin Emery, and Nancy Roberts, *The Press and America: An Interpretive History of the Mass Media*, 9th ed. (Needham Heights, Mass: Allyn & Bacon, 2000): 213; Bill Kovarik, *Revolutions in Communication: Media History from Gutenberg to the Digital Age* (New York: Continuum, 2011): 76-77.

[95] See, for example, "Another Palmer Suit Comes to Naught," *Newspaperdom*, April 22, 1897, p. 4 and "Tireless in Litigation" *Fourth Estate*, Nov. 3, 1898, p. 4.

reform libel law and protect newspapers from "ridiculous" suits.[97] But coverage was counterbalanced by arguments in favor of libel law as an appropriate check against newspapers or reporters that unjustly or carelessly harmed the reputation of individuals who did not deserve it. In an 1889 essay in the *Journalist*, for example, a Texas editor expressed amazement that anyone would sue a newspaper—"the people's best friend"—but encouraged the use of criminal prosecutions of individual reporters and writers because it would require them to be "more careful."[98] In the July, 1894 edition of *Newspaperdom*, Charles Starr, editor of the East Orange, N.J. *Gazette*, argued that "in the desire to print a large amount of reading matter, too little care is frequently exercised in its preparation and editing, too little respect is paid to the rights and wishes of the parties most interested, and the newspaper becomes an organ of defamation and character-wrecking, whose policy should be frowned upon by all thinking men."[99] An 1895 *Newspaperdom* item highlighting a libel suit against an unnamed New York newspaper reflected the rising preeminence of accuracy in reporting. The suit was the result of "an evil we have frequently brought to the attention of our readers, namely, the publication of items reflecting upon the character of a citizen without sufficient verification," the trade paper reported. In this instance, the New York paper had falsely reported "a man of high personal reputation" was arrested for public drunkenness. "When a man's reputation is at

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[96] See, for example, "Topeka Journal is Latest Victim," *Fourth Estate*, June 25, 1904, p. 3-4 and "Verdict Reduced," *Editor and Publisher*, July 9, 1904, p. 1, "… it is assumed that the papers are being sued for speculation."
[97] See, for example, "Reform in the Libel Law" *Newspaperdom*, Nov. 26, 1896, p. 4, in reference to a suit over a report of stolen shoes, which turned out to be paid for.
[98] "The Editor and Libel" *The Journalist*. July 30, 1898 p. 135.
[99] Charles Starr, "For Cleaner Papers" *Newspaperdom*, vol. 3 no. 1, July 1894, p. 6.

stake, make assurance doubly sure—before publication," the editorial advised.[100] An 1898 editorial approvingly quoted a judge's statement on the proper role of libel law in modern journalism, offering it as proof that "all judges are not unjust:" "Important as it is that the reckless and malicious press should be punished," the judge opined, "it is equally important that a careful, reputable and honorable press should be defended in every right, because while one is an agency of oppression, the other is a safeguard to liberty, civilization and happiness."[101]

Industrialization of News and the Telegraph

Massive growth and structural change in the newspaper industry and revolutionary innovations in communications technology accompanied the rise of the popular press. Between 1830 and 1909, the number of daily newspapers published in the United States rose from 65 to 2,600, while the average circulation for those dailies rose from 2,986 to 9,312. In 1850, 4.6 percent of Americans subscribed to a daily newspaper; by 1930 it was 43.1 percent. Newspapers expanded westward along with the American population.[102] Meanwhile, the typical urban newspaper grew from a relatively small operation run by an editor and a few assistants into a large and complex business. Newsrooms, pressrooms, advertising, distribution, and business operations became

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[100] *Newspaperdom*, Aug. 29, 1895, p. 6; see also "A Costly Sensational Item," *Newspaperdom*, Aug. 5, 1897, p. 4.
[101] "Note and Comment" *The Fourth Estate*, April 7, 1898, p. 4.
[102] Lee, *The Daily Newspaper in America*, 70-78, 716-719. In 1830, visiting French political philosopher Alexis de Tocqueville described a typical American as "a very civilized man prepared for a time to face life in the forest, plunging into the wilderness of the New World with his Bible, ax, and newspapers." Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (Garden City, NY: Doubleday, 1969 [1835]), 303.

specialized and departmentalized, especially in the decades following the Civil War. The newsrooms of large metropolitan newspapers moved from an organizational structure that centered around a multi-skilled editor to one that utilized several editors leading different sections, headed by a publisher focused on the overarching business concerns of the enterprise.[103] Before the era of the popular press, a single editor or publisher could typically be expected to know what was on every page of his or her newspaper, and was often intimately involved with most of what was published.[104] By the 1890s, however, journalists argued that the expansion, segmentation, and speed of the average newsroom made such awareness impractical if not impossible for a single editor.[105]

The organizational revolution in the news industry was part of a broader trend in American business in the late 1800s—explosive growth, professionalization, and the integration of production, distribution, and marketing—that had important implications for the social role and legal status of industry.[106] The growth and segmentation of management of the typical newspaper complicated the process of publishing a newspaper

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[103] Gerald Baldasty, *The Commercialization of News in the Nineteenth Century* (Madison: University of Wisconsin Press, 1992): 82-85; John Nerone and Kevin G. Barnhurst, "US Newspaper Types, the Newsroom, and the Division of Labor, 1750-2000" *Journalism Studies* vol. 4, no. 4 (2003): 438, 443-444.

[104] See Smith, *Printers and Press Freedom*, 95-107, 202-206. See also Frederic Hudson, *Journalism United States from 1690-1872* (New York: J & J Harper, 1873): 141-157.

[105] In the context of libel law, the *Milwaukee Sentinel* argued that "nine-tenths of all actions for libel are based upon statements that are not seen by editors or publishers prior to publication," and that "these errors are not always avoidable in the hurry of preparing a large amount of diversified news." "Common Sense Libel Law" *Milwaukee Sentinel*, June 23, 1898 and "The Libel Law," Milwaukee *Sentinel*, February 17, 1897. According to the *Fourth Estate*, "the honest news-presenting papers are in continual danger because they are all liable to mistakes." "Note and Comment," *Fourth Estate*, March 25, 1897.

[106] The leading account is Alfred D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge Mass.: Harvard University Press, 1977).

as well as the definition of success for the enterprise. Advertising departments measured success by the amount of space sold for ads, circulation departments by the timely delivery of papers to as many readers as possible, and editorial departments by the timeliness of news, its accuracy, and its relevance to readers. At times these differing definitions were at cross-purposes, like when a late-breaking news event delayed production and distribution.[107]

Meanwhile, the increasing awareness of the complexity, interconnectedness, and interdependence of many aspects of life in late-nineteenth century urban industrial America led to a rethinking of the very concept of causation.[108] Causal explanations for all sorts of phenomena in the industrial reality of modern society became more difficult to establish as they "now began to be seen as merely the final links in long chains of causation that stretched off into a murky distance."[109] The shift in thinking complicated the legal concept of liability, as judges debated where causal chains should be broken and who should be considered responsible for the harm claimed in a lawsuit.[110] The rise of the concept of interdependence on a broad social level also complicated the process of assigning fault at the level of individual institutions. As the news production industry became more segmented and departmentalized, for example, it became more difficult to identify the individuals who were, or could be, responsible for mistakes in print among the many reporters, editors, copy-editors, typesetters, and pressmen that could have

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[107] Baldasty, *The Commercialization of News in the Nineteenth Century*, 82-83.
[108] Thomas Haskell, *The Emergence of Professional Social Science*, (Urbana: University of Illinois Press, 1977): 13, 28-29, 39-47, 243.
[109] Haskell, *The Emergence of Professional Social Science*, 40.
[110] Horwitz, *The Transformation of American Law*, 54-65.

contributed to their being published. When those mistakes led to lawsuits, the newspapers' structural complexity could create a convoluted causal chain, making it difficult to identify a single specific cause or party to be blamed for them.

Meanwhile, technology played a key role in the ability of the popular press to reach a wider audience, and to do so with greater speed, meeting ever increasing competitive demands for faster, fresher news. The telegraph—incorporated into the process of newsgathering and distribution beginning in the 1840s—was the latest and most significant of a long series of innovations, but it also added speed and scale to an increasingly complex industry with a more diffuse chain of accountability for the publishing of "bad" news. At an institutional level, journalists were increasingly confronted with the prospect of compromising accuracy in the interests of speed and scale.

Newspapers had used cooperatives and joint ventures to gather and share news long before telegraphic technology existed, relying on everything from fast boats to express trains and even carrier pigeons.[111] Since 1792, the United States postal service had offered newspapers the most inexpensive and efficient communication network in the world, which they continued to use for free newspaper "exchanges" even after news wire services were established.[112] The New York Associated Press first put the telegraph to

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[111] On the history of collaborative news gathering efforts in America, see Richard Schwarzlose, *The Nation's Newsbrokers* (Evanston, Ill.: Northwestern University Press, 1989-1990); and Victor Rosewater, *History of Cooperative Newsgathering in the United States* (New York: Appleton, 1930).

[112] Post Office Act of 1792, 1 Stat. 232 (1792); see John, *Spreading the News*; Richard Kielbowicz, *News in the Mail: The Press, Post Office, and Public Information, 1700-1860s* (Westport, Conn.: Greenwood Press, 1972); Wayne Fuller, *The American Mail:*

use sharing news in 1848, and it grew to widespread use for that purpose in the 1850s. By separating long-distance communication from transportation, the telegraph enabled high-speed transmission of messages to newspapers and then to the masses for the first time.[113] Political expediency and concerns about the telegraph's ability to turn a profit led the U.S. government to allow private corporations to develop the technology, and a continued hands-off approach to regulation, even in the face of growing popular support for a government takeover, allowed the Western Union Telegraph Company to control virtually all of the telegraph infrastructure, while the Associated Press was responsible for virtually all of the news transmitted along its wires.[114]

Following the Civil War and into the 1880s, Western Union allowed only Associated Press members to use its lines for regular news transmissions; in return, those members agreed not to support government regulation or competition from another telegraph company.[115] By the 1890s, news from the AP constituted between 80 and 100 percent of the news published in small dailies in the Midwest.[116] The AP's "franchise"

Enlarger of the Common Life (Chicago: University of Chicago Press, 1972), and Starr, *The Creation of Mass Media,* 89-91.

[113] Oliver Gramling, *AP: The Story of News* (Port Washington, N.Y.: Kennikat Press, 1969): 19-32; Rosewater, *History of Cooperative Newsgathering in the United States*, 57-69.

[114] Starr, *The Creation of Mass Media,* 171-172, 174-175; Blondheim, *News Over the Wires*, 161-163, 167. The history of Western Union, the AP, "natural monopolies" over communication and their political and social influence are complex and fascinating. Among recent work on the subject are Richard John, *Network Nation: Inventing American Telecommunications* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010) and Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (New York: Alfred A. Knopf, 2010).

[115] Blondheim, *News Over the Wires*, 161-168; Starr, *The Creation of Mass Media*, 184.

[116] Broker-Gross, "Nineteenth-Century News Definitions and Wire Service Usage," 25-26.

system only allowed new members to be admitted when other AP members in the same town or region unanimously consented, something that rarely happened.[117] Revelations of corruption weakened the AP's grip on the wires over the course of the 1880s, allowing competitors to emerge. The unsettled years during which the stories about Smith, Rutherford, Palmer, De Freitas, and Butler crossed the wires saw the collapse of the United Press Association (UP) and the rise of two others, the Scripps-McRae News Association and Publishers' Press Association (PPA), which would merge in 1907.[118]

Between the nationwide network of telegraph news wire services and free postal news exchanges, every newspaper in America could deliver timely, story-based popular news to its readers by the end of the nineteenth century. The network helped shape newsgathering practices and public expectations of news content. As news was delivered in smaller, more frequent updates, readers experienced greater urgency in following a story as it developed and greater satisfaction in the speed with which they found out about it.[119] Moreover, the network had a profound effect of standardizing American news—its presentation and diffusion—in a way that meant that readers of the Winona, Minnesota *Republican* and the Keokuk, Iowa *Constitution* could expect to read much of the same news, at virtually the same time, as readers in New York and Cincinnati.[120]

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[117] Schwarzlose, *The Nation's Newsbrokers*, 22-28.
[118] Schwarzlose, *The Nation's Newsbrokers*, 186, 198; Rosewater, *History of Cooperative Newsgathering in the United States*, 258, 340
[119] Blondheim, *News Over the Wires*, 38. See also Helen MacGill Hughes, *News and the Human Interest Story* (Chicago: University of Chicago Press, 1940): 2-19, 58.
[120] Czitrom, *Media and the American Mind*, 18. See Simon N.D. North, *History and Present Condition of the Newspaper and Periodical Press of the United States* (Washington D.C.: Census Office, 1884): 110. North reported, "The influence of the telegraph upon the journalism of the United States has been one of equalization. It has

Standardization and nationalization had a significant downside, however, in enabling flawed news to spread throughout the network as quickly as accurate news. The problems confounded politicians in the mid-1800s enough that they began releasing transcripts of speeches to the media prior to their public delivery in order to prevent the process of transcription and transmission from mangling their words and policy positions when they appeared in the newspaper.[121] Facing pressure to deliver messages faster and more cheaply when telegraph services charged by the letter, many news wire operators devised codes and abbreviations, which could lead to confusion and inaccuracy in news reports delivered via telegraph.[122] Journalists felt immense competitive pressure to deliver news that was both timely and accurate, making mistakes feel inevitable. "The manager's chief difficulty," wrote an editor for the New York *Commercial Advertiser* in 1895, "is protecting his readers and public generally … [from] unavoidable errors."[123]

Complicated corporate structures may have obscured the sources of errors and even made them more likely, but the heat of competition compounded the problem. In its defense against a libel case in 1894, the New York *World* placed the blame for a false report on one of the paper's wire service editors. The Second Circuit U.S. Court of Appeals recounted the *World*'s description of its practices:

> The function of the telegraph editor is to read over carefully any dispatch received by him, to correct the English, to eliminate anything which he

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placed the provincial newspaper on a par with the metropolitan journal, so far as the prompt transmission of news—the first and always the chiefest function of journalism—is concerned."

[121] Rosewater, *History of Cooperative Newsgathering in the United States*, 41-43. The practice is still common today.

[122] Standage, *The Victorian Internet*, 116.

[123] "The Manager's Chief Difficulty," *Newspaperdom*, vol. 4 no. 15, Nov. 21, 1895, p. 1.

> thinks does any injustice to anybody or anything, or which causes a doubt in the mind of the reader as to the accuracy of the dispatch, and to put headlines on. Thereupon the dispatch is sent to the composing room, and in due course is printed in the paper. The "publisher" of the *World* testified that the authorized custom in its office is that, unless a dispatch from a distant city "*per se* raises in the mind of the telegraph editor a suspicion of its accuracy, then he cannot change the facts; and it is optional with him then to judge of the importance of the dispatch, and withhold it from the composing room or have it set up." Where there is nothing on the face of the dispatch which raises a natural doubt as to its accuracy, it goes to the composing room, with its statement of facts substantially unchanged.[124]

The *World* explained that the dispatch in question in the case, sent from Cincinnati, differed significantly from the libelous story that ran in the newspaper, but it could not explain where in the process the alteration occurred, because "the dispatch as written out by the telegraph employee in the *World* office could not be found, nor [could the *World*] show which one of its 10 telegraph editors had received it." The court noted that the *World*'s practices "required no effort to be made to verify the accuracy of such dispatches, and no such effort was made in this instance."[125]

The Cincinnati *Post*, in defending itself against one of Annie Butler's lawsuits in 1905, conceded that competition played a role in its publication of the false story about her, in a stark illustration of the combination of conflicting news values that prized both scandal and speed. The *Post*'s telegraph editor testified that he included the story about Oakley's arrest and drug addiction shortly after he received it from the Scripps-McRae

[124] Press Pub. Co. v. McDonald, 63 F. 238, 240 (2d Cir. N.Y. 1894).
[125] Press Pub. Co. v. McDonald, 63 F. 238, 240 (2d Cir. N.Y. 1894).

Press Association because it "was an interesting news item because of the celebrity of the person involved." It was not the editor's typical practice to check facts from wire services, and "it was published immediately, for fear of a 'scoop' by some rival."[126]

In an industry where a reputation for distributing "bad" news could drive down wire service membership or subscription numbers, wire services also rejected blame for errors and inaccuracies along the murky chain of causation. In 1896, United Press filed a $5,000 libel suit against the Rochester, New York *Herald* after the newspaper called a dispatch sent out by the UP a "willful falsification."[127] In December 1899, a claim by *Newspaperdom* that the American Press Association frequently exposed its subscribers to legal problems drew an angry rebuke from the company's president. In his letter to the editor of the trade paper, APA President O.J. Smith claimed that "only three times in eighteen years that we have been in business … have any of our customers been even threatened with suit for a libel contained in our matter." *Newspaperdom*'s claims of inaccuracy could not possibly be justified, Smith wrote, when "putting the few mistakes which can be charged to us against all of the possibilities of errors in the complicated nature and great variety of matter supplied by us."[128] The APA might not be perfect, Smith argued, but it was very good, and it would be difficult in the complex industry to identify the source of any particular error anyway.

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[126] Post Pub. Co. v. Butler, 137 F. 723, 724-5 (6th Cir. Ohio 1905). The first quote is from the editor's testimony, the second from the court's opinion.
[127] "United Press Sues a Newspaper," *Newspaperdom*, Sept. 17, 1896, p. 6. No record of the outcome of the suit could be located.
[128] "Accountability of Plate and Ready-Print Concerns," *Newspaperdom*, Volume 8, Issue 14 (Dec. 7, 1899) p. 6.

As the popular press' business model increasingly relied on a combination of sensationalism and speed to drive up circulation throughout the late nineteenth century, the risk of accidents—in the form of errors and inaccuracies—also increased, and with it the likelihood of libel suits. For nearly 50 years leading up to the 1890s, the telegraph had played an integral role in developing journalistic values of speed and scale in news gathering and publishing. In the serial libel cases, those journalistic values collided with emerging concerns about the propriety of scandals-as-news and the need to protect personal reputation in an expanding public sphere. The cases would strain the limits of libel law by raising complex questions about the role of technology in press freedom and the legal parameters of accountability.

II.

Libel in the Nineteenth Century: Malice or Mistakes?

Editors and publishers who were engaged in the increasingly complex process of gathering and publishing news in the late nineteenth century worked within a legal atmosphere that was traditionally intolerant of "bad" news that harmed people's reputations. Legal standards that reflected the narrow and traditional "bad tendency" test did not favor publishers who claimed to have accidentally or unknowingly published defamatory news reports. Such circumstances did not usually qualify for narrow privileges protecting political criticism from libel suits, nor did the defense for true statements apply. Republication and repetition were considered just as bad as the original publication under the adage, "tale-bearers are as bad as tale-makers."[129] However, the

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[129] Martin L. Newell, *The Law of Defamation, Libel and Slander in Civil and Criminal Cases: As Administered in the Courts of the United States of America* (Chicago: Callaghan, 1890): 350. See also Thomas Cooley, *A Treatise on The Law of Torts, or, the Wrongs which Arise Independent of Contract*, 2nd ed. (Chicago: Callaghan, 1888): 259; and John Townshend, *A Treatise on the Wrongs Called Slander and Libel: And on the Remedy by Civil Action for Those Wrongs*, 4th ed. (New York: Baker, Vorhis & Co., 1890). Newell placed the phrase "tale-bearers are as bad as tale-makers" in quotation marks, but gave no attribution for it. In William B. Odgers, *A Digest of the Law of Libel and Slander*, 5th ed. (London: Stevens, 1881): 161, it is attributed to the 1777 Richard Brinsley Sheridan play, *The School for Scandal*:

> Joseph Surface: The license of invention some people take is monstrous indeed.
> Maria: 'Tis so; but, in my opinion, those who report such things are equally culpable.
> Mrs. Candour: To be sure they are; tale-bearers are as bad as the talemakers—'tis an old observation, and a very true one: but what's to be done, as I said before? How will you prevent people from talking? To-day, Mrs. Clackitt assured me, Mr. and Mrs. Honeymoon were at last become mere man and wife, like the rest of their acquaintance. She likewise hinted that a certain widow, in the next street, had got rid of her dropsy and recovered her shape in a most surprising manner. And at the same time Miss Tattle, who was by, affirmed that Lord Buffalo had

modern processes and practices of the news industry raised new questions in libel cases that complicated the traditional legal analysis and challenged established thinking related to the concept of freedom of the press. Defendant publishers claimed ignorance that allegedly libelous statements were published in the first place or said they had never met or heard of the plaintiffs; editors and reporters claimed that allegedly libelous reports came from sources—individuals, newspapers, or news wires—that they relied on regularly and considered trustworthy. These claims reflected the increasingly common claim among journalists and their advocates that their reliance on the telegraph to inform the public required a revised legal analysis that placed them on more favorable footing in libel cases.

Newspaper editors and publishers complained loudly that libel suits had become more common in the late 1800s and the law offered too little protection for frivolous and expensive suits brought by "shysters." According to the *Journalist* in 1895, "the present libel laws simply offer a premium to pettifogging attorneys, who shower vexatious litigation upon newspapers at enormous cost to the publishers, and not one in ten is proved to be justified if the case ever reaches trial. In a vast majority of instances the whole purpose of such actions is to blackmail publishers, and chiefly for the benefit of

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> discovered his lady at a house of no extraordinary fame; and that Sir Harry Bouquet and Tom Saunter were to measure swords on a similar provocation. But, Lord, do you think I would report these things! No, no! Tale-bearers, as I said before, are just as bad as the tale-makers.
> Joseph Surface: Ah! Mrs. Candour, if every body had your forbearance and good nature!

shysters rather than to do justice to injured citizens."[130] Editors were at least partially right to blame speculative attorneys using the new innovation of a contingency fee—an agreement by which a lawyer agreed to take nothing if a suit was lost but a large sum if it was won—to encourage potential libel plaintiffs to sue the press.[131] The legal profession in general experienced a boom after the Civil War, and "increased competition for business," wrote one legal historian, "appears to have pushed the newcomers at the bar … to generate new kinds of business."[132] On the other hand, urban dailies' scandal mongering and sensationalism, when combined with the increasingly complex and mistake-prone processes of high-speed newsgathering and publishing, also prompted libel suits.[133]

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[130] "The Libel Laws," *Journalist*, March 16, 1895, quoting editorials from the Philadelphia *Times* and Binghamton, New York *Leader*.

[131] Rosenberg, makes this connection in *Protecting the Best Men*, 317 n. 46. The *Central Law Journal* reported contingency fees were an "all but universal custom of the profession" in 1881. *Central Law Journal* vol. 13 p. 381 (1881). According to Lawrence Friedman, although "the upper part of the bar looked with beady eyes at this practice, [it] had its merits, [because] it made it possible for the poor man to sue the rich corporation." Friedman, *A History of American Law* (New York: Simon and Schuster, 1973): 422-23.

[132] John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass: Harvard University Press, 2006), 59-61. Based on census records, Witt found that the number of lawyers jumped 150% from 1870 to 1900. The boom was especially focused on cities and especially among the white children of immigrants.

[133] Definitive documentation of nineteenth century case law and litigation patterns can be elusive, making claims about overall trends difficult to support, but historians conducting studies with a broader focus on litigation than this one have argued that libel cases against newspapers became more common in the late nineteenth century. Whether there was an increase in libel law litigation is not central to the historical argument presented here. The New York *Herald* reported a sudden surge in libel suits in 1869, after compiling a survey and finding more than 700 recent suits with damage claims totaling $47,500,000. The report is reprinted in Frederic Hudson, *Journalism In The United States From 1690-1872* (New York: Harper & Bros., 1873): 747. Rosenberg and Gleason both argued that the number of civil libel suits against newspapers rose steeply after the Civil

Fighting or settling libel suits was expensive, but crippling damage awards were relatively rare.[134] The *Vindicator* of Youngstown, Ohio boastfully reported that it was the target of 10 libel suits between 1893 and 1897, with claims totaling $250,000: "The *Vindicator*, realizing that in these suits was involved no less a question than Freedom of the Press in eastern Ohio, met each case with a fight, conscious and confident that it had never libeled any person, man or woman. The total verdicts rendered against this paper in all these suits amounted to just one dollar and one cent—and all have been paid in full."[135] Nevertheless, publishers complained about the high costs associated with

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War. According to Rosenberg, evidence from appellate courts and literary sources "conclusively shows that libel suits became more common in the late nineteenth century … although only painstaking studies of individual jurisdictions and trial courts can yield precise figures." Rosenberg, *Protecting the Best Men*, 197. Gleason wrote that, based on his review of appellate cases, "the number of litigated libel suits exploded after the Civil War," and "the case law suggests that newspapers' proclivity toward convicting defendants in criminal actions and inserting editorial comment into news reports generated libel suits." Gleason, *The Watchdog Concept*, 66-67. Gleason also reported a surge in coverage of libel cases in the trade press between 1884 and 1895, but this evidence is less reliable as the trade press was neither a comprehensive nor unbiased source. Gleason, "The Libel Climate of the Late Nineteenth Century," *Journalism Quarterly* vol. 70, no. 4 (1993): 893-906, 895. According to John D. Stevens et al., the number of reported criminal libel prosecutions also rose steadily between 1876 and 1906. Stevens et al., "Criminal Libel as Seditious Libel, 1916-65," *Journalism Quarterly*, vol. 43 (1966): 110-113.

[134] Gleason, in his study of trade press coverage from 1884 to 1899, concluded that "few libel plaintiffs won suits, and successful plaintiffs were awarded a small portion of the requested damage awards. The trade journals reported 143 cases in which damages requested and damages won could be determined. Only fifteen awards of $10,000 or more were reported. The highest award reported was $45,000." Although the trade press is unreliable as a conclusive source of information on libel law, it seems likely that large verdicts, at least, would have drawn coverage. Gleason, "The Libel Climate of the Late Nineteenth Century," 899. $10,000 in 1895 would be equal to approximately $272,000 in 2012 and $45,000 in 1895 would be equal to approximately $1,222,000 in 2012, using the Inflation Calculator at http://www.westegg.com/inflation/infl.cgi, which is based on the Consumer Price Index in *Historical Statistics of the United States* (USGPO, 1975).

[135] "Vindicator Vindicated," *Newspaperdom*, March 18, 1897 p. 4.

constantly defending themselves against a libel suit onslaught, and some of the larger papers hired in-house lawyers to provide regular counsel and pre-publication advice.[136] In 1888, the Philadelphia *Times* expressed growing frustration: "The average cost of defending a libel suit, including the necessary time, preparation, employment of counsel, etc., is about $500…. The Times has paid over $20,000 for the defence [sic] of libel suits since it was founded thirteen years ago, and there is a judgment or an acquittal in every case. In other words, this journal has paid over $20,000 as the price of exposing wrong-doers and battling foolish suitors or worse than foolish lawyers to maintain the freedom of the press in the most liberal civilization of the world."[137] The manager of the Denver *Republican* complained to the American Newspaper Publishers Association in 1895 that a single libel case that reached the state Supreme Court three times had ended in a modest verdict for $650, but "I paid about $25,000 lawyers' fees. We keep a lawyer employed. He don't do much else."[138]

As the business model of news production increased in speed, scale, and scope throughout the late nineteenth century, jurists, judges, juries, and journalists played integral roles in a broader ongoing social negotiation related to drawing the boundary lines of legal protection for press freedom. Central to this negotiation was a question about the idea of a report: what should be considered appropriate news for public

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[136] Untitled Editorial, *Journalist*, Aug. 4, 1892 p. 8. According to Gleason, the New York *World* typically paid attorneys annual retainers of $10,000 between 1885 and 1891. Gleason, "The Libel Climate of the Late Nineteenth Century," 902, 905-906.
[137] "No Frivolous Libel Suits," Philadelphia *Times*, Feb. 9, 1888, quoted in Samuel Merrill, *Newspaper Libel: A Handbook for the Press* (Boston: Ticknor, 1888): 31-32.
[138] Minutes of ANPA Annual Meetings, 1895, 79. See Gleason, "The Libel Climate of the Late Nineteenth Century," 902, 905-906. According to Gleason, the New York *World* typically paid attorneys annual retainers of $10,000 between 1885 and 1891.

consumption and how should it be disseminated? Debate over the proper role of libel law with regard to newspapers was reflective of, and informed by, a broader conceptual problem emerging in law. Not only does an examination of the relationship between libel law and the dominant paradigm of civil law help provide context for the unusual serial libel cases, it helps add nuance to our understanding of that structure of nineteenth century legal thought and the challenges that it faced.

A Shifting Legal Paradigm and the Peril of Publishing

The key conceptual problems that arose in libel law at the end of the nineteenth century occurred amidst a broader reconceptualization of law that took place between the Civil War and World War I, as the classical legal orthodoxy that was established during the nation's first hundred years encountered a crisis of legitimacy. The classical paradigm was built on the premise that law best operated as a neutral and limited "night-watchman," maintaining equal opportunity in the decentralized political and economic markets of early America.[139] By this formulation, judges upheld the rule of law by deducing from abstract and objective legal principles the category into which cases fit, and then applying the appropriate rule. A definitive distinction in the classical paradigm was a division between private law, which encompassed the realm in which individuals autonomously exercised their natural rights without interference from the state or from other individuals, and public law, the realm over which the government had coercive authority in matters related to public policy. In the private law arenas of tort, contract, property, and commercial law, judges were envisioned as categorical boundary-keepers,

[139] Horwitz, *The Transformation of American Law*, 3-5, 15.

and the key question in private law controversies was whether one of the parties had interfered with the other's legitimate exercise of his or her rights.[140]

However, the classical emphasis on abstraction, which was intended to guide judges toward objective standards of decision making that were free of political or personal bias, along with the insistence that private and public law never overlap, encountered practical and conceptual instability around the turn of the century.[141] The problems were especially evident in the development of legal thinking and doctrine in tort law, as jurists sought "to bring order to the increasingly messy world that lay outside the courtroom" through ornate legal standards of liability.[142] In tort law, which is the realm of private law dealing with civil wrongs that cause harm or loss, including libel, legal thinkers sought to organize doctrine around the concept of negligence, which required an inquiry into the amount of care that a defendant should have demonstrated in particular circumstances to avoid the harm.[143] Classical theorists argued that the traditional standard of strict liability, which required no inquiry into motive or care in finding liability in the actions of a defendant, was an insufficient means of protecting the rights of individuals and entrepreneurs who acted carefully and with goodwill in conducting day-to-day businesses in an increasingly accident-prone world.[144] More fundamentally, critics argued that because the strict liability approach lacked a moral

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[140] Horwitz, *The Transformation of American Law*, 10-11; Elizabeth Mensch, "The History of Mainstream Legal Thought."
[141] Witt, *The Accidental Republic*, 44; Horwitz, *The Transformation of American Law*, 15.
[142] Witt, *The Accidental Republic*, 44.
[143] Horwitz, *The Transformation of American Law*, 10-11; See Oliver Wendell Holmes, Jr., *The Common Law*, (Boston: Little, Brown, and Co., 1881): 63-103, 115-29.
[144] Witt, *The Accidental Republic*, 1-21, 43-70.

inquiry into the cause of an act or the intentions of an actor, it allowed state intervention into the realm of private law through an unjust redistribution of wealth: either taking money from people attempting to engage in socially desirable economic activity and giving it to passive accident victims, or arbitrarily shifting blame and damages among equally faultless parties without a proper analysis of blameworthiness.[145]

The debate in tort law over the awarding of punitive damages starkly illustrates the conflict over the divide between public law and private law, with particular relevance to newspaper defendants in libel suits. Also known as exemplary or vindictive damages, punitive damages were intended to go beyond compensating a victim for the harm done to "impose a punishment on the defendant, and hold him up as an example to the community."[146] Classical legal theorists debated whether the doctrine, which had a long history in English and American common law, was at odds with the principle that matters of private law should not be used to dictate or enforce standards of public policy that were properly the purview of legislatures.[147]

The problems of drawing clear boundaries between private and public law were especially acute in libel law, as a central purpose of both criminal and civil libel had long been to maintain public order by curbing press "licentiousness" and encouraging self-censorship among publishers who might otherwise wantonly attack the characters of

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[145] Horwitz, *The Transformation of American Law*, 123-124; Witt, *The Accidental Republic*, 46-49. See Holmes, *The Common Law*, 96.
[146] Theodore Sedgwick, *A Treatise on the Measure of Damages, or, An Inquiry into the Principles which Govern the Amount of Compensation Recovered in Suits at Law* 8th ed. (New York: Baker, Voorhis, 1891): vol. 1, 502.
[147] Horwitz, *The Transformation of American Law*, 113-116.

public and private people.[148] Although libel cases involving large news publishing operations could prompt the same types of conceptual problems for establishing liability that convoluted causal chains across a fast industrializing corporate world, however, libel doctrine was generally not swept up in the broader move toward negligence standards in tort law. Faultlessness rarely arose in libel cases, because a culpable publisher could usually be identified, and although the publisher might have claimed that the libel was the result of a mistake, he or she could not claim that it was a total or blameless "accident" for which no one could be held responsible in a legal sense. Courts considered news publishing to be an inherently perilous business.[149]

Toward understanding the disputed doctrine of libel law within the broader context of late nineteenth century legal thought, it is instructive to compare the relevant

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[148] Rosenberg, *Protecting the Best Men*, 125-129. On the role of libel law in the political and constitutional development of the United States, see Leonard Levy's *Legacy of Suppression* and its revision, *Emergence of a Free Press*, providing historical background on press freedom in the period surrounding the framing of the U.S. Constitution, especially with regard to seditious libel. Levy's conclusions about strict legal limits that the early American press faced—particularly under the theory of seditious libel—have been the subject of considerable debate. Jeffery Smith has argued, for example, that Levy's examination of pre-Revolution legal and political thought overlooked both a freewheeling and rambunctious press as well as an insurgent "libertarian press ideology." See Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985) and Smith, *Printers and Press Freedom*.

[149] See Rosenberg, *Protecting the Best Men*, 133. "Insistence upon strict liability for libelous falsehoods, even in newspaper stories about public officials and candidates, constituted a significant exception to the general trend in nineteenth century tort law." See, e.g., John Townshend, *A Treatise on the Wrongs Called Slander and Libel: And on the Remedy by Civil Action for Those Wrongs* 4th ed. (New York: Baker, Vorhis & Co., 1890), 104. "The proprietor of a newspaper is responsible for all that appears in its columns, although the publication may have been made without his knowledge, in his absence, or contrary to his orders. His liability is not on the ground of his being the publisher, nor of being presumed to be the publisher, but because he is responsible for the acts of the actual publisher."

theoretical and jurisprudential work of two of the period's most influential judges: Thomas Cooley and Oliver Wendell Holmes, Jr. Cooley, a legal scholar and member of the Michigan Supreme Court from 1864 to 1885, was a leading theorist in tort law and author of widely read treatises on constitutional law and torts in the 1870s and 1880s.[150] Cooley argued that motive and morality had no place in considerations of liability. In order to protect individual autonomy from government interference, legal analysis should focus exclusively on acts: "that which it is right and lawful for one man to do cannot furnish the foundation for an action in favor of another."[151] Because private law must be based on external, objective standards, Cooley argued, liability should require no inquiry into "the good or bad motives which influenced the action. … Any transaction which would be lawful and proper if the parties were friends, cannot be made the foundation of an action merely because they happened to be enemies."[152]

Cooley's extensive theory of speech and press freedom was influenced by a broad conception of civil liberties as well as the view that the press was a modern instrument of mass education and enlightenment in need of strong protection from government interference. Cooley argued that leading libel case law placed too high a value on protecting the reputations of political and public figures while neglecting the value the

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[150] See Thomas Cooley, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, and Co., 1868) and Cooley, *A Treatise on the Law of Torts, or, The Wrongs which Arise Independent of Contract* (Chicago: Callaghan, 1888). See also Witt, *The Accidental Republic*, 46-51 and Horwitz, *The Transformation of American Law*, 137.
[151] Cooley, *A Treatise on the Law of Torts*, 93.
[152] Cooley, *A Treatise on the Law of Torts*, 830.

public placed in the free discussion of issues of public interest.[153] Cooley argued that the constitutional guarantees of freedom of speech and press required a broad conditional privilege in libel law for the discussion of matters of public concern. Under this privilege, plaintiffs would bear a burden of showing that a defendant acted maliciously and intended to cause harm in order for the libel suit to proceed. A privilege for fair comment on or criticism of politicians or their official acts gradually and unevenly expanded throughout the nineteenth century,[154] and Cooley argued that the purpose of the privilege was to protect not just political speech in general but the more specific and vital social role of newspapers in modern society. Cooley argued that newspapers needed to meet their readers' expectations for "a complete summary of the events transpiring in the world, public or private, so far as those readers can reasonably be supposed to take an interest in them," a task which would be impossible to accomplish "without matters being mentioned derogatory to individuals."[155] A strong conditional privilege ensured constitutional guarantees protecting freedom of the press, Cooley argued, and reflected the reality of a modern information marketplace where mistakes—especially those passed

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[153] Cooley, *Constitutional Limitations* (1868), 438. In particular, Cooley criticized a much-cited 1829 New York case, King v. Root, 4 Wend. 113 (N.Y. 1829) and 7 Cow. 613 (N.Y. 1827), saying the state high court's refusal to even acknowledge "public considerations" such as "freedom of discussion in public affairs" in a case involving a newspaper and a public official offered "no middle ground between absolute immunity for falsehood and the application of the same strict rules which prevail in [cases involving purely private matters]." See also Rosenberg, *Protecting the Best Men*, 157-189; and Rosenberg, "Thomas M. Cooley, Liberal Jurisprudence, and the Law of Libel, 1868-1884," *University of Puget Sound Law Review*, 4 (1980): 49-98.

[154] Clifton Lawhorne found that 25 of the 28 states that had appellate decisions on political libel granted some privilege for libelous political criticism between the Civil War and 1900. See Lawhorne, *Defamation and Public Officials*, 87-110 and Rosenberg, *Protecting the Best Men*, 171.

[155] Cooley, *Constitutional Limitations* (1868), 452-456.

along the telegraph wire—were bound to occur. "Whatever view the law may take, the public sentiment does not brand the publisher of a newspaper as libeller [sic], conspirator, or villain, because the telegraph despatches [sic] transmitted to him from all parts of the world, without any knowledge on his part concerning them, are published in his paper, in reliance on the prudence, care, and honesty of those who have charge of the lines of communication, and whose interest it is to be vigilant and truthful."[156]

As a justice on the Michigan Supreme Court, Cooley encountered practical and conceptual challenges in putting his abstract ideals about press freedom into practice, however, and his views shifted in a way that suggested growing unease with the late nineteenth-century press. Cooley wrote in favor of a presumptive qualified privilege covering libelous news reports that addressed matters of public interest in two cases, first as a dissenter in the 1881 case *Atkinson v. Detroit Free Press*,[157] and then as author of the majority opinion in the 1882 case *Miner v. Detroit Post & Tribune Co*.[158] In *Miner*, the high court ruled that a trial court should have extended a qualified privilege to the *Post* for a story that claimed a police judge was corrupt. The trial court erred, Cooley wrote, because it "put the case upon precisely the same footing with publications which involve merely private gossip and scandal," as if "there is no difference in moral quality between

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[156] Cooley, *Constitutional Limitations* (1868), 454.

[157] Atkinson v. Detroit Free Press Co., 46 Mich. 341 at 384 (Mich. 1881) (Cooley dissenting) "While it is admitted that the public press is often corrupt and often reckless in dealing with private reputations, it is at the same time affirmed that the duty of its conductors to abstain from such misconduct is no plainer than is the obligation of the authorities to refuse to impose penalties when in the exercise of a just independence they make use of their columns for the exposure of public wrong-doers to public condemnation."

[158] Miner v. Post & Tribune Co., 49 Mich. 358, at 364 (Mich. 1882).

the publication of mere personal abuse and the discussion of matters of grave public concern."[159] Just a year later, however, Cooley backed away from the privilege in a case that involved a story in James Scripps' Detroit *Evening News* alleging a University of Michigan doctor had taken advantage of a female patient.[160] In an order denying the publisher's request for a rehearing, Cooley explained that the newspaper's claim of privilege was undercut by the jury's responses to special questions on the matter of damages. The jury had concluded that the "the publication was made in entire disregard of the plaintiff's rights" and that the purpose of Scripps' publication of the story was "sensation and increase of circulation."[161] Although a conditional privilege should support the press in its important public service role, Cooley explained, an absence of regard for an individual's rights, sensationalism, and greed were all sufficient proof of malice for a plaintiff to overcome the privilege. "A false and injurious publication made in a public journal for sensation and increase of circulation is unquestionably in a legal sense malicious," Cooley concluded.[162]

Cooley also narrowed the scope of his rationale for the privilege in the 1883 edition of his treatise, *Constitutional Limitations*, articulating clear boundaries around the subject matter the privilege should protect. In previous editions Cooley had rooted the privilege in the special social role the press served in modern democratic society, but the revised 1883 rationale extended no special status to journalists. Cooley wrote that a

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[159] Miner v. Post & Tribune Co., 49 Mich. 358, at 364 (Mich. 1882).
[160] Maclean v. Scripps, 52 Mich. 214 (Mich. 1883). The Supreme Court had ruled against the *Evening News*, a result that Cooley supported.
[161] MacLean v. Scripps, 52 Mich. 214, at 253 (1884).
[162] MacLean v. Scripps, 52 Mich. 214, at 253 (1884).

newspaper publisher should benefit from a privilege that covers information in the public interest "not because he makes the furnishing of news his business, but because the discussion is the common right and liberty of every citizen."[163] Moreover, Cooley's new rationale reflected a more nuanced and cautious view of the proper role of the newspaper in the public sphere: "there is a difference between the mere publication of items of news in which the public may take an interest, as news merely, and the discussion of matters which concern the public because they are their own affairs. It is one thing to reproduce in the newspaper injurious reports respecting individuals, however willing the public may be to hear them, and a very different thing to discuss the public conduct of a high official."[164] Cooley's revised public-private distinction, based on the social role of the plaintiff, suggested an analytical consideration that would play a complicated role in the serial libel cases and take on constitutional dimensions in a series of U.S. Supreme Court cases beginning with *New York Times v. Sullivan* in 1964; Cooley argued, "a private individual only challenges public criticism when his conduct becomes or threatens to be injurious to others; public characters and public institutions invite it at all times."[165]

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[163] Compare Cooley, *Constitutional Limitations*, (1868): 454 with Cooley, *Constitutional Limitations* 5th ed. (Boston: Little, Brown, 1883): 563.
[164] Cooley, *Constitutional Limitations* 5th ed. (Boston: Little, Brown, 1883): 562.
[165] Cooley, *Constitutional Limitations* 5th ed. (Boston: Little, Brown, 1883): 562. See *New York Times v. Sullivan* 376 U.S. 254 at 270 (1964), affirming "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," which has become a baseline for the consideration of political libel cases. The *Sullivan* doctrine extends a qualified privilege to publishers discussing public persons or issues. In order to recover damages in a libel suit, public officials and public figures must show "actual malice:" that a publisher of a defamatory statement knew the statement was false and published it anyway or recklessly failed to verify the statement's truth. The Court extended the

Oliver Wendell Holmes Jr.'s contributions to the evolution of American legal thought are widely documented.[166] Of particular interest here is the way the evolution of his late nineteenth-century thinking on torts—and especially libel law—compares with Cooley's. Holmes' treatise *The Common Law*, first published in 1881, was a powerful articulation of the proper place of objective standards in private law. Holmes, like Cooley, maintained that tort law analysis of liability should be concerned with acts rather than motives: law deals with "external phenomena," and is "wholly indifferent to the internal phenomena of conscience," Holmes wrote.[167] However, the subsequent removal of any questions of fault in such an analysis led toward strict liability, Holmes argued, leading to the problem of redistribution of wealth by courts, which was anathema to a system of justice built on preserving individual rights and limiting state interference with them.[168] Rather than ask whether a defendant acted with malice or ill will, Holmes argued in his 1881 treatise, questions of fault and blame should be considered from the

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Sullivan rule to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) the Court identified 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. See Richard Digby-Junger, "News in Which the Public May Take An Interest: A Nineteenth Century Precedent for *New York Times v. Sullivan*," *American journalism* vol. 12, no. 1 (1995): 22-39 for a discussion of the analytical links between Cooley's views on libel and freedom of the press and the reasoning of the *Sullivan* decision.

[166] See Horwitz, *The Transformation of American Law*, 109-143; 295 n6. See, e.g., Francis Biddle, *Justice Holmes, Natural Law, and the Supreme Court* (New York: Macmillan Company, 1961); Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court* (Cambridge, Mass: Dunster House Bookshop, 1927).

[167] Holmes, *The Common Law*, 110.

[168] Holmes, *The Common Law*, 95-96.

perspective of whether actions aligned with accepted social customs, "ancient rules" unconsciously adopted over time. These customs were the objective standards required to make tort law consistent and predictable.[169]

Holmes' thinking, like Cooley's, evolved in response to practical and conceptual problems. Holmes' 1894 law review article, "Privilege, Malice, Intent," signaled an acknowledgment that the interplay of these three concepts in tort law threw into question the classical notion that private law, and in particular tort law, could be insulated from public policy considerations by judges reasoning from external, objective legal principles.[170] Holmes drew illustrations from salient and timely problems of labor and capitalism. He noted that cases involving collective action—by workers in the form of a boycott or by commercial enterprises in the form of a "combination"—necessarily involved questions of public policy, but "in the face of the organization of the world which is taking place so fast," the cases did not offer longstanding social customs from which to deduce clear legal rules. The problem "suggests a doubt whether judges with

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[169] Holmes, *The Common Law*, 35-36. See also Horwitz, *Transformation of American Law*, 121- 125. The common law system of the United States relied on the principle of *stare decisis*, which required courts to help establish legal rules and standards by following the sound reasoning of previous decisions involving similar facts. Legal treatises like Cooley's and Holmes' played an important role in pointing up key cases and using them to articulate and refine those standards amid a growing morass of case law on various subjects. According to legal historian Lyndsay Campbell, treatises "communicated not just procedural rules or digests of cases but frameworks for understanding … a body of law." The project of pronouncement and interpretation was especially important to the classical paradigm of legal thought, which highly valued abstraction as an objective means of removing politics and emotion from law. See Campbell, "Libel Treatises and the Transmission of Legal Norms," in *Law Books in Action: Essays on the Anglo-American Legal Treatise*, Angela Fernandez and Markus D. Dubber, eds, (Oxford: Hart Publishing, 2012): 169.

[170] See Horwitz, *The Transformation of American Law*, 127-142.

different economic sympathies might not decide case[s] differently."[171] Moreover, and contrary to his argument in *The Common Law*, Holmes argued in "Privilege, Malice, Intent," that "phenomena of conscience"—including malice—could be essential to considerations of liability.[172] Holmes sought to "call attention to the very serious legislative considerations which have to be weighed" in civil cases and to encourage judges to confront them directly rather than allow them to take "an inarticulate form as unconscious prejudice or half conscious inclination."[173] The very idea of objective judicial decision making in a realm of law insulated from public policy implications had become theoretically problematic, Holmes argued. The theoretical problems were starkly evident in the consideration of late nineteenth century libel cases, where standards for what constituted "bad" news were in flux, and there were clear public policy implications for holding the press responsible for libelous statements.

Two of Holmes' judicial opinions deciding libel cases around the beginning and end of the period of the serial libel suits illustrate an interpretation of doctrine that reflected and influenced case law with regard to privileges for political speech and libelous mistakes. However, their straight-forwardness contrasts sharply with the theoretical grappling in Holmes' theoretical writing on tort law at the time. An 1891 case before the Massachusetts Supreme Judicial Court, *Burt v. Advertiser*, involved a series of stories, some of which had been based on the reports of other newspapers, about an individual's alleged involvement in a corruption scandal in the New York customs office.

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[171] Oliver Wendell Holmes, "Privilege, Malice, Intent," *Harvard Law Review* vol. 8, (1894) p. 8-9.
[172] Holmes, *The Common Law*, 110.
[173] Holmes, "Privilege, Malice, Intent," 9.

The *Advertiser* urged the court to recognize a broad formulation of the conditional privilege for discussion of matters of public concern which was reflective of Justice Cooley's early theoretical writing on the privilege: because the article involved a subject of public importance, it should be considered privileged. Holmes rejected the *Advertiser*'s position. "What the interest of private citizens in public matters requires is freedom of discussion rather than of statement," Holmes wrote. Although the article indeed involved a topic of public interest, Holmes explained, the facts asserted about the plaintiff were not privileged because they were false. "The so called privilege of fair criticism upon matters of public interest," Holmes concluded, did not extend to "facts [that] are not true."[174] More importantly for the doctrine related to serial libel cases, Holmes also turned aside the *Advertiser*'s assertion that its reliance on other newspapers for the story "tended to prove that the [newspaper] had reasonable cause to believe the charges to be true." Belief in the truth of the story did not constitute a defense, Holmes argued, invoking a succinct and often-used statement of the rule with regard to a publisher's supposed intentions or lack of malice: "A person publishes libellous [sic] matter at his peril."[175]

Another opinion, which Holmes authored as a justice on the U.S. Supreme Court in 1909, reiterated the limited opportunities for defenses available to newspapers when

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[174] Burt v. Advertiser Newspaper Co., 154 Mass. 238, 242-243 (1891). The rationale bears a notable resemblance to that of the majority opinion of the U.S. Supreme Court in Milkovich v. Lorain Journal Co. 497 U.S. 1 (1990), in which the court ruled that the First Amendment does not require an absolute privilege for statements of opinion, and that such statements could expose publishers to liability when "sufficiently factual to be susceptible of being proved true or false."

[175] Burt v. Advertiser Newspaper Co., 154 Mass. 238, 245 (1891).

they claimed a libel was the result of a mistake. In *Peck v. Tribune Co.*, the Chicago *Tribune* faced a libel suit over a photo accompanying an advertisement for Duffy's Pure Malt Whiskey. The photo, which purported to show a nurse who recommended Duffy's "as the very best tonic and stimulant for all weak and rundown conditions," was actually a photo of Ms. Peck, who was not a nurse and who was, in fact, a "total abstainer from whiskey and all spirituous liquors."[176] The Seventh Circuit U.S. Court of Appeals in Chicago ruled that Peck could not sustain a claim for libel because the false statements did not amount to defamation *per se*, i.e., they did not, on their face, harm her reputation.[177] Justice Holmes and the U.S. Supreme Court reversed the lower court. "It may be that the action for libel is of little use" to Peck, Holmes wrote, but according to the "general principles of tort … liability is not a question of a majority vote." Although there may be "no general consensus of opinion that to drink whiskey is wrong or that to be a nurse is discreditable … an unprivileged falsehood need not entail universal hatred to constitute a cause of action," Holmes wrote.[178] The *Tribune*'s claim that the advertisement was published by mistake offered no defense, Holmes argued, in a matter-of-fact statement of the majority rule: "If the publication was libellous [sic] the defendant took the risk. … 'Whatever a man publishes he publishes at his peril.' The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an

[176] Peck v. Tribune Co., 214 U.S. 185, 188 (1909).
[177] Peck v. Tribune Co., 154 F. 330 (7th Cir. 1907).
[178] Peck v. Tribune Co., 214 U.S. 185, 190 (1909).

advertisement or a piece of news, the usual principles of tort will make him liable, if the statements are false or are true only of some one else."[179]

Libel Law and 'Bad' News: Perilous Republication

In *Peck*, Holmes provided a blunt articulation of the basic outlines of civil libel law doctrine in the 1890s and early 1900s, including the general judicial disinterest with publishers' motives or intent, at least as a question of liability, when cases involved false statements about individuals or affairs not related to politics. Holmes' favored phrase "a man publishes at his peril" echoed his circa-1881 description of the rationale underlying tort liability standards in *The Common Law*: "a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter."[180] Thanks in large part to the critical analysis of Holmes, much of tort law in the 1880s and 1890s shifted toward negligence standards concerned with questions of whether parties acted with reasonable care and with good motives, a move in legal thinking that accompanied industrialization and sought to reconcile law with the complexities of modern life. But standards of liability in libel law did not follow this shift, and questions about motive or even reasonable care were addressed only as a threshold matter for libel suits when defendants claimed that their publications were true or privileged. A truth defense or a claim to one of the narrow conditional privileges for political speech generally required a showing of a publisher's "good motives and justifiable ends," standards devised in the eighteenth and

[179] Peck v. Tribune Co., 214 U.S. 185, 189 (1909).
[180] Holmes, *The Common Law*, 79-80.

early nineteenth centuries that acted to maintain respectful discourse in politics and the public sphere.[181]

As for libel cases not involving a truth defense or privilege for political content, the doctrine remained indeterminate with regard to key questions that would arise in cases prompted by journalistic values of sensationalism, speed, and scale at the turn of the twentieth century: should accidentally inaccurate reports be treated the same as intentional or malicious lies for purposes of awarding damages? Should each republication or repetition of a libel be treated the same as the original publication? How should standards and practices of courts and juries define the relative rights and responsibilities of the press and plaintiffs?

When a news report was defamatory and neither true nor privileged, as with most libel suits arising from "bad" news, the plaintiff was entitled to an award of damages.

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[181] See Rosenberg, *Protecting the Best Men*, 130-131, 178-206 on the "good motives and justifiable ends" standard. The only absolute privilege that American courts recognized in civil libel suits in the nineteenth century extended to government officials in their official actions, such as judges speaking from the bench and legislators engaged in debate in the legislature. See Van Vechten Veeder, "Absolute Immunity in Defamation Judicial Proceedings," *Columbia Law Review*, vol. 9 (1909): 463; and Veeder, "Absolute Immunity in Defamation Legislative and Executive Proceedings," *Columbia Law Review*, vol. 10 (1910): 131. In 1959, the U.S. Supreme Court observed that the privilege for government officials had a basis in Article I, § 6 of the U.S. Constitution: "Senators and Representatives … shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place." Barr v. Mateo, 360 U.S. 564, 569-570 (1959). On narrow qualified privileges to "fair reports" of government proceedings and "fair comment or criticism" see Kathryn Dix Sowle, "Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report" *New York University Law Review*, vol. 54 (1979): 471-481; Paul Mitchell, *The Making of the Modern Law of Defamation* (Oxford: Hart, 2005): 233-255; and Gleason, *The Watchdog Concept*, 57.

Awarding damages involved hazy standards that required attaching a dollar amount to a loss that was difficult to measure and which the plaintiff was not required to prove having lost.[182] Moreover, libel could trigger punitive or exemplary damages, awarded "to signify [the jury's] sense of a defendant's conduct by fining him to a certain extent … in excess of the amount which would be adequate compensation for the injury inflicted on the plaintiff's reputation."[183] Legal treatises explained that juries had wide latitude to award punitive or exemplary damages when they thought the situation warranted doing so. Evidence could include "all the circumstances attending the publication," including that which showed that the defendant was "culpably reckless or grossly negligent in the matter."[184] Juries were also sometimes instructed to consider a plaintiff's "distress of mind" or "hurt feelings" when considering punitive or exemplary damages.[185] Plaintiffs did not have to show actual injury to recover exemplary or punitive damages for libel, but

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[182] See *The American and English Encyclopaedia of Law* (2d ed., David S. Garland et al., eds.) vol. 18 (1901): 1081, "It is not necessary, in order to warrant a recovery of general damages, that they should have been specially pleaded, or proved upon the trial." and 1114, "In actions for libel and slander there is no legal measure of the general or punitive damages."

[183] Newell, 842-843.

[184] Newell, 785.

[185] Townshend, *A Treatise on the Wrongs Called Slander and Libel*, 271, 652. See Taylor v. Hearst, 107 Cal. 262, at 271 (Cal. 1895), trial court incorrectly refused to instruct the jury, "you may consider the injury to the plaintiff's feelings" in calculating damages; Butler v. Every Evening Printing Co., 140 F. 934, at 935 (C.C.D. Del. 1905), "The plaintiff sought to recover damages for the injury done to her reputation as well as to her feelings; and it was the effect which the article was calculated to have upon the minds of the mass of its readers, and not any actual intention on the part of the defendant to defame the plaintiff, that was material in the consideration of the injury to reputation. This conclusion is supported by abundant authority." In 1910, the Michigan Supreme Court ruled that "actual damages may be increased by reason of the malice of the defendant, because plaintiff's injury to feelings is greater when he suffers from a wrong wantonly inflicted." Schattler v. Daily Herald Co., 162 Mich. 115, at 128-129 (Mich. 1910).

juries could not award more than they claimed to have lost, so "plaintiffs generally [took] care to make their claim of damages sufficiently large."[186]

Journalists joined with critical voices in the judiciary, claiming punitive and exemplary damages wrongly played a public policy role in private law and left important matters of rights and responsibilities to what Justice Holmes had called the "more or less accidental feelings of a jury."[187] Samuel Merrill, editor of the *Boston Globe*, attorney, and author of the 1888 book *Newspaper Libel: A Handbook for the Press*, argued, "the whole principle upon which punitive damages are based seems to be inherently wrong." The proper legal venue for punishing an act was criminal law, not civil law, Merrill argued, and to offer juries the opportunity to assess punitive damages "is to constitute every man a prosecuting officer." Merrill contended that in libel cases, "the power to award a verdict which shall at the same time compensate the plaintiff and punish the defendant, proves too often a ready means of gratifying spite on the part of a prejudiced jury."[188] In June of 1895, The International League of Press Clubs adopted a resolution at its annual convention to lobby states for laws that would "estop punitive damages" in libel suits against newspapers when a retraction was issued.[189]

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[186] Merrill, *Newspaper Libel*, 250; "It is necessary … for the plaintiff to allege in his declaration the amount which he claims to have been injured, and he cannot he cannot recover a larger sum in damages than the amount so alleged. Plaintiffs generally take care to make their claim of damages sufficiently large."
[187] Holmes, *The Common Law*, 126.
[188] Merrill, *Newspaper Libel*, 274-275.
[189] See "International League of Press Clubs," *Newspaperdom*, June, 1895, p. 366-367. In spring 1897, the *Fourth Estate* criticized Pennsylvania legislators for removing a similar provision from the state's proposed "libel law." "Libel Laws and Litigations" *Fourth Estate* Feb. 25, 1897, p. 11; and "Revising Libel Laws." *Fourth Estate* May 13, 1897, p. 1.

Future U.S. Supreme Court Justice David Brewer argued that juries were a central weakness in the common law of libel, but not because of peoples' tendency toward spite for newspapers, rather because of their ignorance and fear of them. "Having little or no character to lose, [jurors] think an attack on character no crime," Brewer argued in an 1886 speech before the Kansas Bar Association. When left to decide damages, jurors simply award the minimum possible, he said, because they suffer from "first, an indifference as to libel and character; and second, a fear that they themselves may be the objects of insinuations and attacks for which no adequate redress is furnished."[190]

Whether juries awarded huge punitive damages, or tiny nominal amounts, judicial standards were not clear about the limits of damage awards in either direction, which made appealing an award because it was excessive or insufficient a difficult task. According to treatise author John Townsend, "a case must be very gross, and the damages enormous, to justify ordering a new trial on a question of damages." On the other hand, Townsend explained, "there is nothing to forbid the granting a new trial, in a proper case, for insufficient damages," but this was "of rare occurrence."[191] Moreover, the amount a jury awarded and the evidence it took into account in calculating the award was subject to the instructions of the judge presiding over the trial, so an appeal over damages often had to claim a legal error was made in those instructions. The law was clearer on the ability of appeals courts to question trial court instructions. In 1878, the U.S. Supreme Court ruled that such instructions were "entitled to a reasonable

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[190] David J. Brewer, "Libel," *Central Law Journal* vol. 22, (1886): 364.
[191] Townshend, *A Treatise on the Wrongs called Slander and Libel*, 524-5. See also William Eggleston *Eggleston on Damages: A Treatise on the Law of Damages* (Terre Haute: Hebb & Goodwin, 1880): 9-10, 633.

interpretation," and directed that "appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury."[192]

Although newspapers in cases involving false and defamatory "bad" news could not challenge the fact of their liability, and appeals over excessive awards were rarely successful, they could present evidence to try and mitigate the amount of exemplary or punitive damages awarded to the plaintiff. As attorney Henry Sackett explained in an 1899 pamphlet on libel law for New York *Tribune* reporters and editors, "how small the sum shall be will depend on how good a case the defendants can make out in mitigation of damages. … The principle underlying all the … defences [sic] is that they tend to show an absence of actual malice."[193] In nineteenth century libel law, "actual malice," also called "express malice," was defined as "ill will or wicked intent." A jury could award plaintiffs exemplary or punitive damages beyond the general damages the plaintiff suffered as a result of the defamatory publication when the plaintiff could provide evidence of actual malice. On the other hand, a publisher could present evidence tending to disprove actual malice and limit the damages awarded to the plaintiff to only general damages.[194] In 1964's *New York Times v. Sullivan*, the U.S. Supreme Court would give the term actual malice a different and more specific meaning in libel cases involving public officials, and later public figures: knowledge of the falsity of a defamatory statement before its publication, or "reckless disregard" for whether it was true or

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[192] *Spring Co. v. Edgar*, 99 U.S. 645 (1878).
[193] "The Law of Libel" *Fourth Estate* Jan. 19, 1899, p. 8.
[194] See generally Townshend, *A Treatise on the Wrongs Called Slander and Libel*, 117, 133-134 and Newell, *The Law of Defamation, Libel and Slander*, 882-909.

false.[195] The nineteenth-century conception of actual malice could include knowledge of falsity or reckless disregard for the truth, but "ill will or wicked intent" was broader and more open to judicial interpretation, and the type of evidence that parties were allowed to present to either prove or disprove actual malice could vary from case to case, state to state, and across federal jurisdictions.[196]

Theodore Sedgwick, author of the 1891 *Treatise on the Measure of Damages*, wrote that the rule for mitigation of exemplary damages included "all circumstances which negative the existence of malice, or show the malice to have been little." Such circumstances included "good faith, the advice of counsel, or belief of right." However, if the defendant showed an absence of actual malice, but acted in a "cruel and abusive manner," exemplary damages could still be awarded. "Thus," Sedgwick wrote, "though the defendant honestly believed the slander he published to be true, yet he published in a wanton and reckless manner, or maliciously, the plaintiff may recover exemplary damages."[197]

Courts varied in their determination of what types of circumstances could demonstrate "good faith" or a lack of actual malice in cases arising out of mistakes in the industrialized late nineteenth century press. In particular, as "bad" news traveled fast

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[195] See *New York Times v. Sullivan* 376 U.S. 254 (1964). Justice William Brennan, author of the *Sullivan* decision, later expressed regret at choosing the term "malice" because he thought it confused jurors. See Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (New York: Houghton Mifflin Harcourt, 2010): 227.

[196] A survey of the varied and evolving libel law standards in non-political cases across the United States in the nineteenth century is sorely needed and would be extremely valuable to our historical understanding of the concept of freedom of speech. It is hoped that the general portrayal of that variance offered here, where relevant to the serial libel cases between 1890 and 1910, is a step in that direction.

[197] Sedgwick, *A Treatise on the Measure of Damages*, vol. 1, 540.

along wire services around the country, an important and common question was whether a publisher could mitigate damages by showing that a defamatory statement was republished, without malice, from another source.

One leading case on the question of republication, cited and quoted extensively in libel law treatises and case law, was *Dole v. Lyon*, an 1813 case in which Judge James Kent wrote for New York's highest state court that the publisher of the Troy, N.Y. *Northern Budget* could not defend himself from a libel suit by claiming that he had simply republished a defamatory letter written by a third party.[198] To recognize such a defense, Kent argued, "would be no check on a libelous printer, who can spread the calumny with ease and with rapidity throughout the community," adding, "the injury is inflicted by the press, which, like other powerful engines, is mighty for mischief as well as for good." The publisher's proposition that the court consider republication as a defense was "as destitute of foundation in law as it is repugnant to principles of public policy," Kent argued, which required that "individual character must be protected, or social happiness and domestic peace are destroyed." It was important that a civil cause of action be available to individuals in instances of republication not just to discourage libel, but also to ensure that those who suffered reputational harm had some means to sue and collect damages, Kent contended. "It is not sufficient that the printer, by naming the author, gives the party grieved an action against him," Kent explained. "The author may

[198] Dole v. Lyon, 10 Johns. 447 (N.Y. Sup. Ct. 1813). See Newell, *The Law of Defamation*, xlvi, 352-353, 356, 656; Townshend, *A Treatise on the Wrongs Called Slander and Libel*, lxvi, 305, 306, 651.

be some vagrant individual who may easily elude process; and if found, he may be without property to remunerate in damages."[199]

On the other hand, later cases proposed that republication could offer proof of lack of malice. In 1876, the Minnesota Supreme Court ruled in *Hewitt v. Pioneer Press* that the *St. Paul Pioneer Press* could mitigate damages by presenting evidence showing that other local newspapers had published similar stories to the one at issue, leading the *Pioneer Press* publisher to believe his article was true when he published it. "Where the statements … have come to the knowledge of the defendant through … newspapers, before his publication of the writing, he may prove such facts, in order to show that, when he repeated the statements, he reasonably believed them to be true," the court ruled.[200] In other words, republication could be presented as part of a claim that a publisher believed his statement to be true, and therefore lacked malice.

An 1887 libel case in the federal district court for Western Missouri offered a different and more expansive rationale for protecting republication, rooted in the social role of newspapers in democratic society. In *Edwards v. Kansas City Times*, future U.S. Supreme Court Justice David Brewer explained to a jury that the *Times*' claim that it republished a defamatory article it found "in a responsible sheet" should be part of the jury's consideration of damages "because it is a function and duty of newspapers to furnish information to its readers of the current events."[201] Brewer's rationale echoed Cooley's conception of a doctrine that reflected the reality of the modern news

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[199] Dole v. Lyon, 10 Johns. 447, at 450 (N.Y. Sup. Ct. 1813).
[200] Hewitt v. Pioneer-Press Co., 23 Minn. 178, at 180 (Minn. 1876). The court cited an 1829 English case, Saunders v. Mills, 6 Bing. 213 (1829).
[201] Edwards v. Kansas City Times Co., 32 F. 813, at 819-820 (C.C.D. Mo. 1887).

marketplace and the expectations of readers, going so far as extending a "right" to the public to receive information: "it would be a physical impossibility to send an agent to every place, where events, tragedies are transpiring, to ascertain by personal examination the exact facts. A paper could not give us all which we have a right to hear of the current events of the day," Brewer said. Although the jury should "see to it that plaintiff is compensated for the injury which her character has sustained," in the form of general damages, Brewer concluded, "while doing that you are not required to render such a verdict as will put a check and stop upon the legitimate pursuit of information in respect to matters of public interest."[202]

The general rule on republication according to Martin Newell's libel law treatise, on the other hand, was simply that it was inadmissible because it was "irrelevant."[203] However, the "one exception" to the rule was if a defendant identified the source of the defamatory statement in question when it was published, in which case the fact could be admitted in mitigation of damages, "as proving that he bore the plaintiff no malice."[204] Among the American cases Newell cited as examples for the exception were an 1878 Indiana Supreme Court case in which the publisher of the *Evansville Daily Courier* was allowed to offer both "evidence of the rumor of the truth of the alleged libel" and "evidence of the defendant's motive in publishing the alleged libel" in mitigation of

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[202] Edwards v. Kansas City Times Co., 32 F. 813, at 819-820 (C.C.D. Mo. 1887).
[203] Newell, *The Law of Defamation, Libel and Slander*, 893; "Evidence of previous publication by others is inadmissible in mitigation of damages. The fact that others besides the defendant have defamed the plaintiff is a wholly irrelevant matter."
[204] Newell, *The Law of Defamation, Libel and Slander*, 894.

damages, as well as *Edwards v. Kansas City Times*.[205] Treatise author John Townshend provided a more comprehensive view of the rule, writing that several states had dealt with republication in slander cases, including Connecticut, where courts had allowed mitigation of damages for the repetition of slanderous rumors beginning in 1793, but then reversed that position 1822.[206] In Pennsylvania, New Jersey, Maine, Illinois, Indiana, Ohio, and Missouri, evidence relating to republication could mitigate damages in slander cases, Townshend wrote.[207] However, "the first case in which the question appears to have been raised in libel was in the Supreme Court of Pennsylvania," in 1803. In *Runkle v. Meyer*, the court ruled that although naming a source for a repeated defamatory statement could mitigate damages in a slander case, it could not in a libel case, because "the offence of a libel is more heinous, as its circulation of the slander is more extensive, and derives too an additional degree of malignity, from its being done premeditatedly."[208] Townshend also cited the 1813 New York case *Dole v. Lyon* as rejecting republication as a defense in libel, as well as *Atkinson v. Detroit Free Press*, the 1881 Michigan Supreme Court case in which Justice Cooley made a strident dissenting call for a qualified privilege. There, the majority of Michigan justices ruled that "no doctrine is better settled than that a person has no more right to put in circulation the opinions or statements of

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[205] Newell, *The Law of Defamation, Libel and Slander*, 895. See Heilman v. Shanklin, 60 Ind. 424 (1878) and 32 F. 813 (C.C.D. Mo. 1887).
[206] Townshend, *A Treatise on the Wrongs Called Slander and Libel*, 304; see Leister v. Smith, 2 Root 24 (Cir. Ct. Conn 1793), although repeating a slanderous rumor "did not justify [defendant] repeating [it], yet it may lessen the presumption of her having spoken the words maliciously;" and Treat v. Browning, 4 Conn. 408 (1822), husband and wife cannot mitigate damages by claiming slanderous stories did not originate with them, and they were only repeating what they heard.
[207] Townshend, *A Treatise on the Wrongs Called Slander and Libel*, 304-305.
[208] Runkle v. Meyer, 3 Yeates 518 (1803).

other persons concerning private character than he has to publish his own. When such publication is made it cannot be justified by the proof that such views were expressed or entertained."[209]

Republishing a libelous story might be a genuine mistake, but libel law doctrine did not offer it much chance as proof against actual malice. Rather than embrace a concept of press freedom that tolerated errors by the industrialized press in the interest of their value to society, as a few jurists proposed, most courts tended to hold to traditional standards: "tale-bearers are as bad as tale-makers" and "whatever a man publishes he publishes at his peril."[210]

Not surprisingly, newspaper publishers called for greater legal protection for their mistakes in the late nineteenth century. State and national newspaper associations launched efforts to reform libel law through statutes that codified defendant-friendly evidentiary standards for trials, like ensuring a defendant's right to give "proof of intention" to undercut the assumption of malice, or requiring that in order to receive exemplary or punitive damages a plaintiff had to prove that either a libelous statement was published with "malice in fact" or that a retraction of the statement was requested and denied.[211] The efforts were moderately successful—at least eleven states passed libel

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[209] Atkinson v. Detroit Free Press, 46 Mich. 341, 353 (1881).
[210] See Newell, *The Law of Defamation*, 253; Peck v. Tribune Co., 214 U.S. 185, 189 (1909).
[211] See, for example, 1898 N.J. Laws 476. For examples of reform efforts see "Libels Against Newsdealers" *Journalist* March 22, 1884; "Indiana's Libel Bill" Boston *Daily Advertiser*, February 25, 1895; "Libel Law Reform" Philadelphia *North American*, October 05, 1895; Benjamin Briggs Herbert, *The First Decennium of the National Editorial Association of the United States* (Chicago: National Editorial Association, 1896), 141-142, 161, 276, 282, 544; American Newspaper Publishers Association, *Report*

reform laws between 1885 and 1900.[212] However, some of the laws were repealed after only a few years, and others, particularly those that barred a libel suit against a newspaper when it promptly retracted the story in question, were ruled unconstitutional by state supreme courts.

In 1888, for example, the Michigan Supreme Court threw out an 1885 state statute that barred plaintiffs in libel suits against newspapers from recovering exemplary or punitive damages when the libel did not involve bad faith or false imputations of criminal activity, and was retracted as soon as possible. The statute, the court ruled, unconstitutionally infringed on Michiganders' rights to protect their reputations, while unequally benefitting newspaper publishers over other potential libel defendants. "There is no room for holding … that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property," the court ruled. "It is one of those rights, necessary to human society that underlie the whole social scheme of civilization."[213] The ruling reflected a Blackstonian approach to the question of libel: its analysis required no balance between the right to reputation and the right to freedom of speech or the press, as libel was presumptively outside the protection of the guarantees to that right. In 1904, the Kansas Supreme Court struck down a similar retraction statute in that state on similar grounds. In *Hanson v. Krehbiel*, the court ruled that the statute

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of the Annual Meeting of the American Newspaper Publishers Association (New York: American Newspaper Publishers Association, 1896), 83; "The Libel Laws," *Fourth Estate*, February 4, 1897.

[212] See 1885 Mich. Pub. Acts 233; 1887 Minn. Laws. 308; 1895 Ind. Acts 91; 1895 Ill. Laws 315; (repealed in two years later: 1897 Ill. Laws 297); 1897 Wis. Sess. Laws 640; 1897 Pa. Laws 204 (repealed in 1901); 1897 Mass. Acts 561; 1898 Ala. Laws 32; 1899 Wash. Sess. Laws 101; 1900 Ohio Laws 295.

[213] Park v. Free Press Co., 72 Mich. 560 (1888).

violated a specific provision of the state constitution which guaranteed that "all persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law." by limiting some libel plaintiffs' ability to recover damages.[214]

In the meantime, some newspapers tried extralegal means of discouraging libel suits. Editors in Detroit, Boston, and Cincinnati each formed agreements among the newspapers of their cities not to publish stories about libel suits in the hopes that lesser public awareness would cut down on the suits.[215] In 1898 the New York Press Association offered a $5,000 reward "for proof against lawyers who have excited groundless actions or legal proceedings against any daily newspaper" in New York. The idea was that potential plaintiffs would opt for the guaranteed $5,000 when approached by "shysters" who offered to represent them on a contingent basis in a libel suit, rather than go to court and risk losing.[216]

The organized actions of editors and publishers—efforts to pass statutes that undercut plaintiffs' cases as well as more creative (and ethically questionable) schemes—were aimed at stopping libel suits before they got to a trial, where newspaper defendants faced liability and evidentiary standards that offered them few defenses. In spite of

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[214] Hanson v. Krehbiel, 68 Kan. 670 (1904). See also Osborn v. Leach, 135 N.C. 628 (1904) North Carolina retraction statute unconstitutional because it limited recovery of actual damages to economic losses. For more on retraction statutes, see Donna Lee Dickerson "Retraction Statutes and Their Constitutional Implications," *Journalism Quarterly*, vol. 56, no. 1 (1979): 157-161; and Zechariah Chafee, "Possible New Remedies for Errors in the Press," *Harvard Law Review*, vol. 60, (1946) 1-43.

[215] Minutes of ANPA Annual Meetings, 1895, 76; "Boston," *Journalist*, Feb. 2, 1889, p. 3 and "Boston," *Journalist*, Aug. 29, 1892, p. 10; "Do Not Publish News of Libel Suits," *Fourth Estate*, July 8, 1894, p. 4; "Suppressing Libel News," *Newspaperdom*, June 11, 1896 p. 6. See also Gleason, "The Libel Climate of the Late Nineteenth Century," 894, 903.

[216] "Union Against Shysters" *Fourth Estate*, Feb. 3, 1898, p. 6.

arguments from journalists and prominent judges about the need to protect newspapers, mistakes and all, for their value to an informed democratic society, American courts at the turn of the twentieth century were mostly unwilling to recognize rules that would place the rights of newspapers to publish the news over the rights of individuals to maintain a good reputation. Libel law sharply illustrated the conceptual difficulty facing the classical orthodoxy of tort law in maintaining separate private and public legal spheres, as one of the doctrine's central aims was to maintain "social happiness and domestic peace" by maintaining respectful discourse in the public sphere, especially among those "who can spread the calumny with ease and with rapidity throughout the community."[217] This mix of private and public ends provided a key rationale for refusing to recognize negligence standards that arose in other realms of tort law; the motive and intent of a publisher, and the care with which editors and reporters gathered and published the news only mattered for purposes of lowering the financial impact of a ruling against them, and could only limit their liability when they claimed the publication was true or a matter of public concern. The trend toward sensationalism and speed in journalism helped convince many judges that their role in libel law was less to draw clear distinctions between public and private law, and more to mind the boundary between permissible speech and that which tended to disrupt public order by harming individuals. The proper purpose of libel law, according to this position, was to encourage caution and restraint in the press by applying objective standards that protected individuals'

[217] Dole v. Lyon, 10 Johns. 447 (N.Y. Sup. Ct. 1813).

reputations in most circumstances from the perils of an industrialized and institutional press.

III.

The Smith and Rutherford Cases: 'A wrong and perilous system'?

On June 8, 1890, Juliette C. Smith boarded a train in Toronto, Canada, bound for New York City to meet her husband, a wealthy and well-known Toronto merchant named John C. Smith. Joining her on the journey was Edward Rutherford, a friend of the Smiths and a man with whom, according to witnesses in Mrs. Smith's libel suits, she "was known to be on terms of intimate acquaintance."[218] Mr. Smith later testified that he knew his wife and Rutherford would be on the train together—in fact the two men had planned the trip—and he met them both at Grand Central Station when they arrived in New York.[219] However, some of the newspapers that received wire service news from the United Press Association painted a different picture of the intentions of Mrs. Smith and Mr. Rutherford: according to the story filed by a Toronto-based correspondent, they had absconded from Toronto with plans to elope in New York, and Mr. Smith, after receiving a telegraph about their plan, had hurried there to confront them.[220] In the wire service story, both Rutherford and Smith were identified by only their last names, but courts that heard the subsequent libel suits ruled that any person acquainted with them could identify them from the article.[221]

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[218] Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 244 (2d Cir. N.Y. 1893).
[219] Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 245 (2d Cir. N.Y. 1893); Smith v. Matthews, 152 N.Y. 152, at 154 (N.Y. 1897).
[220] See Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 243 (2d Cir. N.Y. 1893) for the version of the story that appeared in the New York *Evening Sun* on June 14, 1890.
[221] Smith v. Chicago Herald, see *Chicago Legal News*, vol. 26, no. 40, p. 317-318, June 2, 1894 for the full opinion of the Circuit Court of Cook County. The opinion is also republished in *Albany Law Journal*, vol. 50, p. 23, July 7, 1894.

The serial libel suits of Rutherford and Smith, based on "bad" news shared via wire services, introduced new factors related to the speed, scale, and accuracy of those reports that complicated the standards of fault and accountability central to libel law. The cases raised new questions about rights and responsibilities that led judges and juries to reconsider how blame should be assigned and, subsequently, how compensation for harm should be calculated. Newspaper defendants argued that their important social role in speedily disseminating news required that they rely on wire services for the accuracy of their reports, and that the publication of "bad" news in these instances should therefore not be considered sufficiently malicious to justify an award of punitive damages. The arguments raised questions about fair compensation when a newspaper defendant claimed to have committed a justifiable error in completing its duty, and when a plaintiff claimed to be defamed by every republication of the same story all along the telegraph line. Appellate courts' rulings and their rationales reflected both doctrinal and philosophical differences about an acceptable journalistic report as they confronted these new issues.

In the early 1890s, an "imputation of a want of chastity to a female, married or unmarried," was libelous *per se*, meaning the plaintiff did not need to plead or demonstrate additional contextual facts to prove that she was defamed. As Newell explained in the 1890 edition of his treatise on libel and slander, adultery, fornication, and prostitution were illegal in almost every state; therefore, accusing a woman of being unchaste—even in language that was not explicit—was equivalent to accusing her of

committing a crime and was defamatory.[222] Both Juliette Smith and Edward Rutherford, who had the slightly more challenging case to make in showing that he was defamed by the accusation that he facilitated Smith's illegal unchastity, sued newspapers that published the story syndicated by the United Press. In cases that played out between 1890 and 1897, juries awarded Smith $7,500 in her suit against the New York *Sun*, $4,000 in her suit against the Buffalo, New York *Morning Express* and *Illustrated Express*, and $15,000 in her suit against the Chicago *Herald*. Rutherford won his suit against the New York *Morning Journal*, although the damage award was not specified in the appellate record.[223]

The fact that the libelous story came from a wire service played a central role in the newspapers' arguments on appeal in the Smith and Rutherford cases. All of the publishers contended that they should have been allowed to present a wire service defense at trial in order to mitigate damages: the fact that they considered the United Press and its Toronto agent to be trustworthy sources of information and therefore published the story in their usual "course of business"[224] should have been considered proof of a lack of actual malice and should therefore have precluded or limited the

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[222] Newell, *The Law of Defamation, Libel and Slander*, 152, 152-166. Newell noted that, in Massachusetts, the doctrine also extended to accusing a woman of being drunk. See also Diane Borden, *Beyond Courtroom Victories: An Empirical and Historical Analysis of Women and the Law of Defamation*, Ph. D. Thesis, University of Washington, 1993.

[223] Of the three case studies, the Smith and Rutherford cases yielded the least clarity on how many lawsuits were actually filed. The account here is drawn entirely from the appellate record in four cases: Morning Journal Asso. v. Rutherford, 51 F. 513 (2d Cir. N.Y. 1892); Smith v. Sun Printing & Pub. Asso., 55 F. 240 (2d Cir. N.Y. 1893); Smith v. Matthews, 152 N.Y. 152 (N.Y. 1897); and Smith v. Chicago Herald, see *Chicago Legal News*, vol. 26, no. 40, p. 317-318, June 2, 1894.

[224] See Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 246 (2d Cir. 1893) and Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317.

punitive or exemplary damages available to the plaintiffs. The wire service defense that the newspapers sought to present pivoted on the contention that it would be impossible to expect newspaper publishers or editors to fact-check every single item they published, and, at any rate, an absence of caution in that regard did not necessarily prove a presence of actual malice for the purposes of awarding punitive or exemplary damages. For example, the *Morning Journal*, in its appeal to the Second Circuit U.S. Court of Appeals in New York, argued that "it would be a physical impossibility for a newspaper to send an agent to every place where events are transpiring to ascertain by personal examination the exact facts, and that, if such a rule were insisted upon, 'a paper could not give us all which we have a right to hear of the current events of the day.'"[225] In the Chicago case, the *Herald* argued that "it had been misinformed by an agent selected with due care and caution," and that the story was "selected with reasonable care."[226]

In two of the cases, the newspapers claimed that trial court judges' jury instructions harmed their cases by indicating that the failure to verify news met the necessary standards to justify punitive damage awards. In *Smith v. Sun Printing & Publishing Association*, the trial judge had allowed the paper to present evidence explaining that its report had come from a wire service, but the *Sun* claimed he also unfairly undermined the paper's defense in his explanation to the jury of exemplary damages. "If you think that the fact that the article was received, in the ordinary course of

[225] Morning Journal Asso. v. Rutherford, 51 F. 513, at 515 (2d Cir. N.Y. 1892); the opinion cited Edwards v. Kansas City Times Co., 32 F. 813 (C.C.D. Mo. 1887), the case in which Judge Brewer instructed a jury that it should consider the accidental republication of libel by a newspaper to be a factor in deciding whether to award punitive damages.

[226] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, p. 317, June 2, 1894.

business, from a reliable … news agency, is sufficient to excuse the defendant from the duty of investigation, of inquiry, of delay, for the sake of accuracy, before it published this most damaging article, then you will not give punitive damages" the Judge said, adding "if you think that the defendant was guilty of reprehensible negligence in publishing the article without further attempts to verify its truth, then you are justified in giving such a reasonable sum in damages as shall be an example to deter against similar future negligence."[227] Similarly, in *Smith v. Matthews*, the publisher of the Buffalo *Morning Express* and *Illustrated Express* argued that the trial judge erred in telling the jury, "you may find actual malice if you find [the newspaper] failed to make an investigation as to the truthfulness of the charge."[228]

The fact that the defamatory story came from a wire service also played a role in the New York *Sun*'s argument that the number and outcome of Smith's other lawsuits for the same libelous story should factor into the jury's calculation of damages: a "libel syndicate" defense.[229] The theory of the defense was that presenting evidence of other cases and their outcomes could lead the jury to conclude that Smith had already been sufficiently compensated for the overall harm done by the libel, and would reduce the damages it levied against the *Sun*. The trial judge, however, had refused to allow the *Sun* to present testimony related to any of Smith's other libel suits for the same story.[230] Second Circuit U.S. Court of Appeals Judge Emile Henry Lacombe dismissed the *Sun*'s

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[227] 55 F. 240, at 246 (2d Cir. N.Y. 1893).
[228] 152 N.Y. 152 at 154 (N.Y. 1897).
[229] The term "libel syndicate defense" is the author's, using the Fourth Estate's 1898 term "'libel syndicate" describing the Tyndale Palmer's suits. See "The Past Year," *Fourth Estate*, Jan. 6, 1898.
[230] Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 245 (2d Cir. 1893).

argument that a libel syndicate defense should have been available. Any evidence about other lawsuits arising out of the same United Press story "was wholly irrelevant and immaterial," Lacombe ruled. "That other newspapers, which published similar libels, had been prosecuted by the plaintiff for their acts, was a matter with which neither court nor jury had any concern."[231]

Moreover, in *Morning Journal v. Rutherford*, *Smith v. Sun*, and *Smith v. Matthews*, state and federal appeals courts in New York ruled that the wire service defense lacked a basis in legal doctrine or principle, and ruled that it was unpersuasive and unreasonable. The federal district court in *Smith v. Sun*, for example, noted that "in actions for libel the amount of damages is very peculiarly a matter for the jury," and that the Sun had failed to show the "gross error, prejudice, perverseness … corruption" or "undue motives," necessary to overturn its verdict.[232] The courts cited libel cases in which juries awarded punitive damages not only where there was evidence of "bad faith" or "malice," but also where there was "recklessness," "carelessness," or "wantonness."[233]

The appellate judges' rejection of the wire service defense mixed doctrinal interpretation with criticism of the newspapers' careless use of news wires in gathering and publishing news where individual reputation and the existing doctrine of libel were

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[231] Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 246 (2d Cir. 1893).
[232] Smith v. Sun Pub. Co., 50 F. 399, at 401 (C.C.D.N.Y. 1892), citing Gibson v. Cincinnati Enquirer, 10 F. Cas. 311 (C.C.S.D. Ohio 1877); Townshend, *A Treatise on the Wrongs Called Slander and Libel*, § 293 and Odgers, *The Law of Libel and Slander*, 291.
[233] Smith v. Matthews, 6 Misc. 162, at 164 (N.Y. Super. Ct. 1893): "Punitive damages may be awarded not alone where the publication is made in bad faith, and in fact malicious, but where it is recklessly, carelessly or wantonly made." See also Morning Journal Asso. v. Rutherford, 51 F. 513, at 515 (2d Cir. N.Y. 1892); Smith v. Sun Pub. Co., 50 F. 399, at 401 (C.C.D.N.Y. 1892); and Smith v. Matthews, 152 N.Y. 152, at 158 (N.Y. 1897).

concerned. According to federal district judge Nathaniel Shipman, it was reasonable to conclude that jury members were not prejudiced or hostile toward the New York *Sun* in awarding Smith $7,500, but rather that they found the newspapers' use of the wire in gathering and publishing news without first verifying it to be "a wrong and perilous system."[234] Judge Theodore Bartlett of the New York Court of Appeals, the state's highest court, wrote in *Smith v. Matthews* that although he did not conclude that the Buffalo *Morning Express* and *Illustrated Express* were "impelled by a wicked intent to injure this plaintiff," he also observed that "it was not their custom, on receiving articles of news, to ascertain their truth or falsity before publication. The publishers who adopt this reckless rule in the conduct of their business must abide the consequences."[235] According to Bartlett, the consequences properly included punitive or exemplary damages.

More than any other judge who heard appeals in the Smith and Rutherford cases, however, Second Circuit Judge Lacombe combined concerns about the careless practices of the press with outrage at news values the stories demonstrated. In his July 1892 opinion in *Morning Journal v. Rutherford*, Lacombe wrote "there was no excusable motive" for the newspaper's publication of "a bit of spicy gossip dealing with the domestic infelicities of private persons … and to publish it without making any effort to verify its truth was a piece of reprehensible negligence which may be fairly characterized as wanton."[236] In another opinion, denying the New York *Sun*'s motion for a new trial in

[234] Smith v. Sun Pub. Co., 50 F. 399, at 402 (C.C.D.N.Y. 1892).
[235] Smith v. Matthews, 152 N.Y. 152, at 158 (N.Y. 1897).
[236] Morning Journal Asso. v. Rutherford, 51 F. 513, at 515 (2d Cir. N.Y. 1892).

April 1893, Lacombe rejected the *Sun*'s argument that the trial judge prejudiced the jury when he made negative statements about the newspaper from the bench. "That the comments in this particular case were harsh is manifestly due to the circumstance that the facts in the case were what they were," Lacombe wrote. "When, in his discretion, [the judge] decided to express an opinion as to the libel, it is not easy to perceive how he could have said much less."[237]

Lacombe was outraged not just because the newspapers had carelessly published a falsehood about Smith and Rutherford, but because they defended this gross invasion of privacy as part of their role in serving the public interest. "That the public has such a right to be informed as to the private life of every individual, as to the domestic affairs of every family, as to the happiness or infelicity which may characterize every household, as will warrant the proprietors of newspapers who cater to its wants in publishing any falsehood they may think interesting to their readers, without any investigation as to its truth, is a proposition … to which this court is not prepared to assent," Lacombe wrote.[238] He was not the only judge troubled by the unwanted publicity cast upon Smith. Judge Bartlett wrote that an award of less than $4,000 might have "answered the purposes of justice" in Smith's case against the Buffalo newspapers, however the jury's decision was acceptable given that "this publication was grossly negligent, and attacked, without the shadow of justification, the good name of an innocent wife and mother, charging her, in effect, with unfaithfulness to her marriage vows, and the abandonment of her children."[239] Lacombe

[237] Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 246 (2d Cir. N.Y. 1893).
[238] Morning Journal Asso. v. Rutherford, 51 F. 513, at 516 (2d Cir. N.Y. 1892).
[239] Smith v. Matthews, 152 N.Y. 152, at 158 (N.Y. 1897).

and Bartlett not only saw no value in a standard that could limit the punitive damages levied against careless and sensational newspapers, they also saw harm in denying those damages to a private individual who did not seek the publicity cast upon her by "bad" news.

Two other opinions in the Smith and Rutherford cases suggested alternative theories of liability in libel in cases involving wire services and serial libel, reflecting the unstable state of tort law at the turn of the twentieth century. In the first of three appeals in *Smith v. Matthews*, an intermediate New York state appeals court rejected the Buffalo *Morning Express* and *Illustrated Express*'s assertion of a wire service defense applying a strict liability theory known as *respondeat superior*, or the master-servant doctrine. Under this doctrine, an employer shares liability for the acts of his or her employee or agent.[240] Applying this rule, the court found that the newspaper could not shift blame or liability to the wire service or an individual reporter or editor. "When the defendants had provided means of publication and intrusted [sic] to an agent the discretionary power of publishing or rejecting, investigating or taking chances of the truthfulness of an article," the court ruled, "his recklessness becomes theirs, and it rested with the jury to characterize the act and withhold or award punishment."[241]

Offering yet another analytical approach that stood in stark contrast to the judicial opinions of the New York judges was Circuit Court of Cook County Illinois Judge

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[240] See Horwitz, *The Transformation of American Law*, 14-15, 39-43. The doctrine was contested by, among others, Oliver Wendell Holmes, Jr. for its refusal to acknowledge a more articulated theory of liability. See Holmes, "Agency," (pts. 1 and 2) *Harvard Law Review* vol. 4, 345 and vol. 5, 1 (1891).

[241] Smith v. Matthews, 6 Misc. 162, at 164 (N.Y. Super. Ct. 1893):

Edward F. Dunne, who granted the Chicago *Herald*'s motion to set aside a jury's $15,000 damage award to Juliette Smith in May 1894.[242] Dunne's ruling relied on a theory of liability that placed some of the responsibility of the harm with the plaintiff rather than the defendant, couched in a criticism of her actions surrounding the libel claim and a discussion of the modern public service role of the press. Dunne's reasoning accepted the logic of the wire service defense, and his criticism of the plaintiffs' motives in filing the suits suggests he would have entertained the libel syndicate defense had it been presented.

Embracing a public service theory of the role of the press in society, Dunne asserted that Rutherford and Smith must have known, along with "all intelligent persons … that news is gathered by such a paper [as the *Herald*] from multitudinous sources, and from the whole face of the earth, and published hot from the telegraph wires." Further, they must have known "that it is absolutely impossible for this modern engine of information to do the work which the times and the people expect and demand, and at the same time verify every item and explore for possible falsity in what seems true." Indeed, just like the New York papers, the *Herald* did not argue the story was true or its publication justified; it maintained that it had been misinformed, and that no one associated with the newspaper knew Smith or had "malice of any sort toward her."[243] Dunne further observed that "neither the plaintiff, nor her husband, nor anyone on her behalf" notified the *Herald* about the offending article or requested a retraction or

[242] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317-318. Dunne would later serve as mayor of Chicago and governor of Illinois.
[243] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317.

apology; the editors said they found out about the error when the lawsuit was filed more than two months after the article was published. Smith also "made no effort … to punish, either civilly, criminally, or otherwise, the correspondent who was the author of the article." In other words, Dunne wrote, "the party claiming to be injured by the circulation of a falsehood did not a thing to stop its further circulation, or to diminish the evil resulting from the publication."[244] Dunne drew an analogy to cases involving physical injuries and breach of contract that reflected a liability standard of assumption of risk, a standard which acknowledged when the harmed party was not fully without fault.[245] In both types of civil cases, Dunne said, the injured party was "required by law" to take reasonable steps to lessen the injury in order to succeed on a later civil claim.[246] Moreover, Smith provided no proof of "any monetary damage, or any actual loss of social standing" as a result of the story published in the *Herald*, although she was also entitled to compensatory damages for her mental and physical suffering, Dunne wrote, "and to punitive damages in the discretion of the jury."[247]

With regard to the $15,000 damage award, Dunne concluded that although "it is exceedingly difficult to draw the line at a certain figure and say what is just and unjust," his independent examination of libel cases in Illinois and other states in which verdicts

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[244] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317.
[245] See Witt, *The Accidental Republic*, 50-51.
[246] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317. "In cases of physical injuries caused by the negligence of others the injured person is required by law to lessen and reduce the injury so far as it lays within his power, by medical and surgical attention and personal care and caution. Even in cases of breach of contract the party not in fault is by law held to do all that lie reasonably can to lessen the amount of loss," Dunne wrote.
[247] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317.

were reversed for excessive damages convinced him that "to allow this verdict to stand … would be not only in defiance of all precedents, but a plain violation of justice."[248] Newspaper publishers "must answer for wrong done even without express malice, but they are entitled to fair treatment," Dunne wrote.[249]

Although the $15,000 damage award qualified as excessive according to Dunne's comparison to other libel cases, his decision to overturn it was unusual in comparison to the other Smith and Rutherford cases. The courts that refused to overturn a jury's award to Smith or Rutherford as excessive argued that to do so required evidence that the jury was actuated by "improper motives;" passion or prejudice against the defendant, for example.[250] Although this was an inexact standard and one that tended to prevent reversals based on excessive damages, it was more in line with common law standards.[251] Dunne did not propose that there were improper motives or prejudicial coercion at the trial level in *Smith v. Chicago Herald*. Rather, he found that the jury's award was not in

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[248] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317. None of the Illinois cases listed involved damages more than $7,000, and most were $3,000 or less. In Indiana, damages were reduced from $8,000 to $2,000 in Curran v. Bridwell, 21 N. E. Rep. 664, in a case "in which an unmarried female was charged with being a prostitute." In Holmes v. Jones, 3 N. Y. S. 156 (N.Y. 1888) "it was held that the verdict for $5,000, for charging a man with blackmailing, shows prejudice, and was excessive." Dunne noted that the highest damage award for libel known at that time was $20,000 in Maclean v. Scripps, 52 Mich. 214 (Mich. 1883). "In that case, however, the question of excessive damages was not raised in the Supreme Court."

[249] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317-318.

[250] Rutherford v. Morning Journal Asso., 47 F. 487, at 488 (C.C.D.N.Y. 1891). See also Smith v. Sun Pub. Co., 50 F. 399 (C.C.D.N.Y. 1892).

[251] See Townshend, *A Treatise on the Wrongs Called Slander and Libel*, 524-525, "A case must be very gross, and the damages enormous, to justify ordering a new trial on a question of damages." See also William Eggleston *Eggleston on Damages: A Treatise on the Law of Damages* (Terre Haute: Hebb & Goodwin, 1880): 9-10, 633.

line with other awards for libel, without specifically naming an amount that would have been appropriate.

Neither the Smith and Rutherford cases specifically, nor the emerging serial libel issue in general, prompted much discussion in the trade press in the early going. *Newspaperdom* offered a tepid editorial position on the wire service defense, making note of the Smith and Rutherford cases but not taking a firm or reflective stance, and offering instead basic strategic advice and a caution for editors and publishers in their use of wire service news. In July 1894, the trade paper advised editors to take care in publishing wire service reports that they had not independently verified. The article quoted a Philadelphia *Ledger* editorial that argued, "making the newspaper, and all those who contribute to it, responsible for [their] statements … best honors journalism by maintaining [its] integrity." It also reprinted part of a Lorain, Ohio, *Herald* editorial that rejected the contention that "an editor is no more responsible for what he prints than is the telegraph operator for the message he sends over the wire." Instead, the editor "is morally and legally responsible for what he prints, whether he writes it or not," *Newspaperdom* counseled readers. "Certain other dailies … might not have had … the judgments for libel against them secured by a Toronto lady, if they had in fine working order such a rule and had applied it to the verification of wired reports, whether from special correspondents or news associations."[252] Although libel law was a frequent topic in the trade press of the 1890s, the Smith and Rutherford cases and their implications for wire service news drew

[252] *Newspaperdom*, July 1894, p. 17.

almost no discussion.[253] Standing in isolation and playing out over five years among dozens of other libel cases, some involving more unique facts or prominent plaintiffs, it may have seemed that the five Smith and Rutherford cases were not worthy of coverage or did not appear to be the beginning of a trend. The trade papers also tended to depend on the editors and reporters who read their publications to send items related to libel law and other issues, and the lack of coverage may have also been due to disinterest or unawareness of among those reader-contributors.

Smith and Rutherford's serial libel cases raised issues of first impression for the courts where industrialized speed, sensationalism, and inaccuracy led to "bad" news. The emerging problem led newspaper defendants to formulate a wire service defense and libel syndicate defense centered on a claim that the burden of damages should be diminished in light of the accidental nature of the tort. Although those defenses led judges and juries to reflect on how blame should be assigned and, subsequently, how compensation for harm should be calculated, the cases did not result in an immediate reconfiguration of libel doctrine.

Newspaper defendants in the Smith and Rutherford cases responded to the perception of a threat to their use of the telegraph by formulating specific legal defenses meant to protect its use. The professional practice that gave rise to these cases—the selection and publication of wire service news without checking its truthfulness—was altogether common in the competitive newsrooms of the late nineteenth century. Wire services had become a vital part of the news business, and the publishers' legal

[253] For discussion of the trade press' calls for libel law reform, see chapter II.

arguments reflected a concern that existing libel doctrine would limit or even eliminate their ability to collect and publish interesting news if they constantly risked large libel verdicts.

The appeals court decisions presented two opposing views on the wire service defense and the rationale supporting it that reflected competing conceptions of the role of technology in journalism in the public sphere. In the New York cases, judges considered the newspapers' printing of the story about Smith and Rutherford to fall well within the standards of "carelessness" or "wantonness" required to justify awards of punitive damages, regardless of their having come from a wire service. At the same time, the courts concluded that if the juries that awarded punitive damages did so out of their offense and outrage at the newspapers' practices, that motivation did not amount to the "improper motives" that would necessitate a reversal for excessive damages; the courts accepted the verdicts and rejected the wire service or libel syndicate defenses the newspapers proposed to mitigate damages. It was reasonable and not prejudicial, the courts reasoned, for juries to consider the newspapers' practices "wrong," i.e., invasive of privacy or likely to harm reputation, and "perilous," i.e., careless or wanton, even if the libel could be explained as accidental.

Judge Dunne, meanwhile, asserted a very different legal interpretation and rationale in overturning the trial court's award of $15,000 in damages to Smith in her case against the Chicago *Herald*. Dunne's legal rationale was based on a view of the responsibility of the parties that struck a wholly different balance from the New York courts. Under Dunne's rationale, Smith and Rutherford had a responsibility, like victims

of other types of accidents, to take basic steps to minimize the harm caused by the false story; and they did not do so. Moreover, the newspapers' use of wire services in doing "the work which the times and the people expect and demand,"[254] required legal leeway for the possibility that mistakes—including accidental libel—might occur. The *Herald* was certainly liable for whatever harm was caused by its publication of the false story about Smith and Rutherford, but the liability was not the *Herald*'s alone, and the plaintiffs also had a duty to attempt to minimize the harm caused when the accident occurred, Dunne argued.

The difference between the courts' framing of legal responsibility also reflected a difference in drawing lines among rights to reputation, information, and free expression. The key source of outrage in Lacombe's opinions—and a pivotal difference in his and Dunne's interpretations of the serial libel cases—was the press' broader claim that they were protecting and enriching a public right to information through their own free expression. Lacombe said he was not willing to assent to the idea that any public or press right extended into "the private life of every individual, as to the domestic affairs of every family, as to the happiness or infelicity which may characterize every household."[255] The individual right to reputation was more important than the public's interest in the purported affairs of socialites or the press' aim to satisfy that interest, Lacombe argued. Dunne, on the other hand, concluded that although newspapers had a duty to take care where the reputational rights of individuals were concerned and "answer for wrong done," as a "modern engine of information," newspapers had a right to "do the work

[254] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317.
[255] Morning Journal Asso. v. Rutherford, 51 F. 513, at 516 (2d Cir. N.Y. 1892).

which the times and the people expect and demand" and to employ the technology of the day in so doing.[256]

[256] Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, p. 317.

IV.

The Palmer and De Freitas Cases: Nominal Damages

The *Fourth Estate*'s term "libel syndicate" was both accurate and ironic when used to describe the ongoing series of lawsuits that Tyndale Palmer pursued against newspapers across the country between 1892 and 1900 in response to the false claim that he and hotelier Joao Francisco De Freitas had embezzled money from the Auer Incandescent Light Company.[257] The term conveyed both an apt description of Palmer's systematic approach to the litigation as well as an accusation that he was driven more by profit motive than a desire to repair his reputation. On the other hand, the *Fourth Estate* may have overlooked the fact that "libel syndicate" could just as easily be leveled at the news wire services of the day, a derogatory description of practices which regularly resulted in the efficient mass dissemination of "bad" news.

In prompting a series of nearly identical libel suits across the country, the story about Palmer and De Freitas raised a similar legal scenario to the story about Smith and Rutherford. However, the Palmer cases played out very differently, reflecting a more complicated relationship between the legal standards of libel law and social conceptions about the role of the press in society than was evident in the earlier set of cases. Juries rarely awarded large damages to Palmer, and appeals court opinions generally contained more cold legal reasoning than heated rhetoric, two outcomes that reflected a lesser sense of outrage at the content of the "bad" news story and less sympathy with the plaintiff Palmer. The scale of Palmer's legal campaign encouraged more publishers to assert a

[257] "The Past Year" *Fourth Estate*, Jan. 6, 1898, p. 3.

libel syndicate defense, but judges were not necessarily more willing to accept it. Moreover, the sheer number of lawsuits offers the opportunity to consider how jurisdictional differences might have helped drive a broader litigation strategy on Palmer's part. The appellate courts based their decisions on a growing body of law on the specific subject of serial libel and the libel syndicate and wire service defenses, reinforcing the growing case law while elaborating less on the broader legal theories of rights and responsibilities at play in the cases. In the meantime, as opposed to the Smith and Rutherford cases, where appellate judges' opinions played the most visible role in clearly articulating the boundaries of acceptable journalistic practices, it was the juries in the Palmer cases that took a more important role in delineating where those boundaries should be drawn. The nominal amounts awarded to Palmer in many of his suits suggest that the false story about his alleged financial embezzlement was more in keeping with public expectations about what was appropriate news for the public sphere.

Newspapers and the trade press also engaged more actively outside of the courtroom in the Palmer cases than they did with the Smith and Rutherford cases. Newspapers reporting the lawsuits—often including their own involvement in them—engaged with the court of public opinion, mixing objective reportage with editorial explanations and excuses for their publication of the allegedly defamatory article. The trade press' strategic role was also more pronounced, advising newspapers targeted by Palmer, De Freitas, or other libel plaintiffs that they were better off to fight the cases in court than to settle them. Such a strategy, the trade papers explained, often resulted in lower costs while discouraging potential future plaintiffs.

Palmer was a businessman, and he employed an entrepreneurial approach in his litigation against newspapers that published the United Press story alleging he and J. F. De Freitas stole over $400,000 from Palmer's employer in Brazil. Palmer learned that the story was first reported in the Oct. 1, 1892 Philadelphia *Times*, sent by telegraph to the main United Press office in New York City, and then sent on to wire service subscribers. Palmer identified the newspapers that published the story, and sent letters to them demanding that they retract it and compensate him for the harm done to his reputation. When the newspapers refused, or—more often—printed a retraction but declined to send him money, he sued them. Palmer's attorney, John S. Dove of Philadelphia, contacted lawyers in cities and towns where newspapers had published the story and asked whether they would agree to serve as counsel on the lawsuits, working on a contingent basis.[258] In other cases, Palmer acted as his own attorney.[259] Palmer did not follow through with all of the lawsuits he threatened or filed, and courts dismissed them when he did not pay a bond or failed to appear in court. Newspaper and trade press coverage of the lawsuits described a system whereby Palmer would decide whether or not to pursue suits in a

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[258] Palmer v. United Press, 67 A.D. 64, at 66 (N.Y. App. Div. 1901) provides the best explanation of how the story reached the United Press wires, although the case leaves plenty of questions about the story's origin. See also Palmer v. Matthews, 29 A.D. 149, at 151 (N.Y. App. Div. 1898); "Sued for One Hundred Thousand Dollars Damages," Winona, Minn. *Daily Republican*, Oct. 6, 1894, p. 2; and "That Suit for Libel," Jackson, Mich. *Citizen Patriot*, Dec. 13, 1895, p. 6. It is notable that Palmer sued United Press, the wire service that syndicated the story and a defendant that would be least able to assert a wire service defense. The suit was stymied by the fact that the company went out of business in 1897, leading to procedural and evidentiary problems. The legal issue in the 1901 opinion cited above, for example, was how to proceed in the discovery process—Palmer demanded access to files that the UP claimed no longer existed.

[259] "Tireless in Litigation," *Fourth Estate*, Nov. 3, 1898, p. 4; "Sued for One Hundred Thousand Dollars Damages," Winona, Minn. *Daily Republican*, Oct. 6, 1894, p. 2.

particular state depending upon the outcome of his first case—what the papers referred to as a "test case."[260]

Palmer's damage claims were usually between $20,000 and $100,000 per lawsuit. De Freitas' claims usually matched Palmer's on the few suits that the Brazilian filed. The *Fourth Estate* remarked that the total of Palmer's estimated claims, just over $2 million, was "a princely panacea for a smirch, whether on the character of Venus or Vesta."[261] Although an exact count of Palmer lawsuits may be impossible to establish through documentary evidence, it is clear that the crusade was immense and far-reaching. The *Republican* of Winona, Minnesota set the number at 126 in on October 6, 1894.[262] At the May 1897 trial in Palmer's suit against the Buffalo, New York *Illustrated Express*, an attorney for the newspaper claimed while cross-examining Palmer that the number was "152, or thereabouts," but Palmer 's attorney objected to the question and Palmer refused to confirm that number.[263] At the high end, the *Fourth Estate* speculated in its November 24, 1898 edition that "when he has concluded his litigations he will have sued 600 daily

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[260] "A Libel Suit that Fizzled," *Newspaperdom*, April 1894, p. 477; "Tyndale Palmer Wins One Suit," Chicago *Daily Tribune*, Feb. 2, 1895, p. 7.

[261] See "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897, p. 1. This article was an incomplete but invaluable resource because it included a table listing the 47 known cases and their resolution up to July 1897. Given the challenges associated with nineteenth century trial court research, it is as fortuitous a primary source as one could hope for, despite the obvious potential for bias in favor of the press. $100,000 in 1892 would be equal to approximately $2,400,000 in 2010, based on the Consumer Price Index in *Historical Statistics of the United States* (USGPO, 1975). Palmer's approximate average damage claim across the suits collected here was just over $46,000.

[262] "Sued for One Hundred Thousand Dollars Damages," Winona, Minn. *Daily Republican*, Oct. 6, 1894.

[263] Palmer v. Matthews, 29 A.D. 149, at 156 (N.Y. App. Div. 1898). Palmer objected because he argued, successfully in the end, that the total number suits he filed for the same alleged libel was immaterial to the *Illustrated Express*' defense.

newspapers."[264] One reason a specific number is so difficult to determine is because Palmer sometimes dropped or abandoned the suits, while he settled others out of court. Even those that reached a judge or jury are difficult to document since they were filed all over the country at a time when the quality and consistency of judicial record keeping varied from courthouse to courthouse. Regardless of the number, part of Palmer's overall litigation strategy appears to have been to sue some newspapers based on having lived in or near the places they were published.[265]

Palmer stated in his U.S. passport application, filed on Nov. 14, 1889 and probably in anticipation of his trip to Brazil, that he was born Oct. 20, 1854 in Kilgore, Ohio, a town about 40 miles southwest of Youngstown, in the eastern part of the state. As of 1889 Palmer had only one child, a son named Donald, who was born in Washington, Iowa, in 1887.[266] Palmer was an 1876 graduate of the Washington Academy, a small college, where he later took a position teaching "physiology and elocution."[267] In summer 1885, Palmer moved to Minneapolis, where he leased a skating rink in order to transform it into a temporary opera house space for a seasonal run of light opera performances. The *Minneapolis Tribune* noted that the inaugural season of the Alcazar Opera House was the city's introduction to "summer theatricals" which had "become the fashionable rage in the east, where the cheap prices have made the performances exceedingly popular with

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[264] Editorial, *Fourth Estate*, Nov. 24, 1898, p. 3.
[265] According to the *Fourth Estate* De Freitas filed tandem suits against the Rome, N.Y. Sentinel, St. Louis *Post-Dispatch*, Utica, N.Y. *Observer*, Milford, Mass. *Journal*, and St. Paul, Minn. *Pioneer Press*. "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897, p. 1.
[266] U.S. Passport Application, Tyndale Palmer, Nov. 15, 1889.
[267] *The History of Washington County, Iowa, Containing a History of the County, Its Cities, Towns &c*, (Des Moines, Iowa: Union Historical Company, 1880): 431.

all classes."[268] According to one lengthy report about Palmer's background, published following the revelation of his alleged theft from the Auer Company, he moved to Philadelphia and took a job with a local newspaper, *The Press*, in "about 1886."[269] Palmer was soon hired by the Auer Company, which was then called the Welsbach Incandescent Gas Light Company, and was sent back to Minnesota to act as one of the company's directors in the Twin Cities.[270] Palmer was sent to Brazil in 1889 to negotiate the sale of a light bulb patent and remained there for about a year. Newspaper reports of the alleged theft said that the discrepancy between what Palmer said he received in return for the patent and what he was actually paid was not discovered until 1892, when two other employees traveled to Rio De Janeiro and examined local transaction records.[271]

Many of Palmer's lawsuits were filed in places where people might have been familiar with him. In Ohio, Palmer sued newspapers in Mansfield, Youngstown, Canton, and Cleveland, all of which are in the eastern half of the state. In Iowa, he sued

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[268] "Summer Amusements," *Minneapolis Tribune*, May 31, 1885, p. 3. See also "The City," Minneapolis *Tribune* June 17, 1885, p. 5. Palmer apparently acted in the theater as well as managing it, even standing in for an ill performer in an emergency; see "Taken Suddenly Ill," Minneapolis *Tribune*, July 1, 1885, p. 3 and "Amusements," Minneapolis *Tribune*, July 4, 1885, p. 4.

[269] "Very Nervy: A Gigantic Steal of Nearly Half a Million Dollars," Maysville, Ky. *Daily Public Ledger*, Oct. 3, 1892, p. 3. The article was probably printed in the *Public Ledger* via wire service. It is unlikely that the small town paper compiled this report on its own.

[270] "Very Nervy: A Gigantic Steal of Nearly Half a Million Dollars," Maysville, Ky. *Daily Public Ledger*, Oct. 3, 1892, p. 3. An 1889 Minneapolis City Directory lists Palmer as one of the Welsbach Company's seven local directors.

[271] See "Very Nervy: A Gigantic Steal of Nearly Half a Million Dollars," Maysville, Ky. *Daily Public Ledger*, Oct. 3, 1892, p. 3; "A Big Theft Discovered," Pittsburgh *Dispatch*, Oct. 2, 1892; "Theft of More than Four Hundred Thousand Dollars," St. Paul *Daily Globe*, Oct. 3, 1892; and "Palmer a Youngstown Man," Pittsburgh *Dispatch*, Oct. 3, 1892.

newspapers in Keokuk and Cedar Rapids, both of which are about 45 miles from Washington, but he also sued newspapers farther away in larger regional hubs like Waterloo, Des Moines, and Fort Dodge. Among the newspapers Palmer sued in Minnesota, several were in the Twin Cities, including the St. Paul *Pioneer Press* and Minneapolis *Times*, but the others included the St. Cloud *Times*, Winona *Republican*, and Duluth *Evening Herald*. In Pennsylvania he sued papers in Pittsburgh and Oil City. But Palmer also sued newspapers in places where a connection is not so obvious. He sued newspapers in New York City, where any businessman of the late 1800s would presumably want to maintain a reputation for honesty, but also in cities and towns in Upstate New York like Buffalo, Rochester, Syracuse, Utica, Cortland, Lockport, and Rome. He filed several suits in Massachusetts, and at least one each in Maine, Wisconsin, Illinois, and Georgia. He settled a suit with the *Post-Dispatch* in St. Louis and sued four newspapers in Indianapolis.[272]

Palmer appears to have had a clear litigation strategy based on several factors, including suing some newspapers based on his having lived in or near the places they were published and where he was more likely to be known and able to show reputational harm, as well as in jurisdictions where he was more likely to succeed, like New York, which had already established an opposition to serial libel defenses in the Smith and

[272] The record of the Palmer and De Freitas cases compiled for this project was drawn, in part, from newspaper and trade press coverage of the lawsuits. As discussed above, it may be incomplete, but it is considered sufficient for the purposes of the broad legal historical discussion here. De Freitas' tandem suits included those against the Rome, New York *Sentinel*; St. Louis *Post-Dispatch*; Utica, New York *Observer*; Milford, Mass. *Journal*; Lockport, New York *Journal*; St. Paul *Pioneer Press*; and Winona, Minn. *Daily Republican*. A list of the suits, their disposition (if known) and sources is provided in the Appendix.

Rutherford cases. In at least one instance, Palmer successfully challenged a jurisdictional decision to try his libel case in Illinois, arguing that the case could be removed to New York because the defendant newspapers had sufficient subscribership there.[273]

Few juries awarded Palmer significant damages, and none awarded the full amounts to which he claimed to be entitled. Palmer's largest award was $7,500 in his suit against the New York *Daily News*, which was upheld by the state's highest court in 1899.[274] A jury in Youngstown, Ohio awarded Palmer $1,350 in his suit against the *Telegram* in November 1896.[275] Of the 47 suits listed in a table accompanying the *Fourth Estate*'s July 22, 1897 report about Palmer's campaign, 12 were listed as having been decided in the plaintiffs' favor. The 12 included the New York *News* verdict for Palmer, as well as a $50 award against the Rome, New York *Sentinel*; six cents against the Rochester, New York *Post Express*; six cents against the Buffalo, New York *Illustrated Express*; $150 against the Syracuse *Herald*; $25 against the Utica, New York *Observer* (which dropped to $10 on a retrial after Palmer's appeal); $50 against the Cortland, New York *Standard*; $58.75 against the Hornellsville, New York *Tribune*; $1.50 against the Canton, Ohio *Repository*; and 6 and one quarter cents against the Pittsburgh *Leader*. De Freitas reportedly won $10 in his suit against the Utica *Observer*, and six cents against the Rome *Sentinel*.[276] Twenty-one of the cases identified by the *Fourth Estate* were listed as dismissed, most because Palmer had failed to provide a bond, which is a payment

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[273] Palmer v. Chicago Herald Co., Same v. Chicago Evening Post Co., 70 F. 886 (C.C.D.N.Y. 1895).
[274] "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897, p. 1. Palmer v. New York News Pub. Co., 158 N.Y. 664 (N.Y. 1899).
[275] *New York Times*, Nov. 13, 1896, p. 2.
[276] "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897, p. 1.

needed to secure a trial. One was "not tried yet," another was "never tried," and a third labeled "no trial." Two cases—one against the *Courier* of Waterloo, Iowa and the other against the *Republican* of Cedar Rapids, Iowa—were listed as having been won by the defendant newspaper.[277]

Some newspapers settled with Palmer or De Freitas out of court rather than face a libel suit, and most of the settlements were considerably larger than the typical trial award of nominal damages or less than $100. According to the *Fourth Estate*, as of July 1897 the Boston *Herald* and Cleveland *World* had each settled with Palmer for $500, the Brooklyn *Eagle* for $1,500, the St. Louis *Republic* for $1,000, and the Pittsburgh *Dispatch* for $1,200. The St. Louis *Post-Dispatch* settled with each plaintiff for undisclosed amounts.[278] There is little information in the historical record explaining exactly why the publishers that chose to pay Palmer a settlement did so, but it is likely that they believed that a court case would be more costly and complicated than a settlement. In the words of the *Fourth Estate*, "in regard to those … cases where defendants made a compromise there can be no doubt that the action of the defendants was influenced by uncertainty as to general views that might be taken under the state libel laws by a court or jury and not because of any sense of wrong doing." If the average cost of defending a libel suit was "about $500" in 1888, a settlement of around $1,000 could

[277] "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897, p. 1.
[278] "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897, p. 1.

be considered a reasonable alternative for a newspaper publisher regardless of the likelihood of a winning or losing in court.[279]

Nevertheless, the March 18, 1897 edition of the *Fourth Estate* encouraged publishers to fight Palmer's libel suits "to the last limit in the courts" because even if they lost the cases they were not likely to be saddled with the crippling damage awards he claimed. The trade paper cited Palmer's suit against the Youngstown *Vindicator*, which had recently been dismissed, and the paltry $10 verdict Palmer was awarded against the Utica *Observer* as evidence that courts and juries were sympathetic to newspapers. It called the $7,500 verdict against the New York *Daily News* an exception, "with every prospect of a reversal." The reason publishers could expect friendly treatment from juries, even if the law and the facts were not on their sides, was because Palmer and De Freitas "might just as well have lived with the man in the moon so far as the public was interested in them … and the damage done them was theoretical and problematic," the *Fourth Estate* explained. In other words, jury members that may not have heard of Palmer or De Freitas before being empaneled would not be sympathetic to their demands for heavy damages. Moreover, "publishers should bear in mind that every one who consents to a compromise makes it harder for the others" by encouraging Palmer to continue the crusade. "The Fourth Estate still has full faith in the fairness of juries as a rule, and recommends publishers everywhere to place their confidence in a fair hearing and an impartial verdict rather than a compromise," the trade publication concluded.[280]

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[279] Gleason, "The Libel Climate of the Late Nineteenth Century," 905. See Chapter II for a discussion of the costs of fighting a libel suit.
[280] "Tyndale Palmer's Suits," *Fourth Estate*, March 18, 1897, p. 6.

The *Fourth Estate*'s evidence was flawed, but its reasoning is worthy of consideration. According to its own reporting in the very same March 18, 1897 issue, the suit Palmer filed against the Youngstown *Vindicator* was not in response to the October 1892 article accusing him of theft but in response to a different article, "written by a friend of Palmer's and … thought to be a defence [sic] and vindication of him."[281] Neither the *Fourth Estate* article nor others reporting the dismissal of the suit explain the court's rationale, and the court itself might not have issued a written opinion.[282] Moreover, astute followers of the Palmer libel suits would have known that a Youngstown jury awarded Palmer $1,350 in his suit against that city's *Telegram* just few months earlier; had the *Vindicator*'s case reached a jury its publisher might have had reason to be concerned. The *Fourth Estate*'s prediction about the verdict against the New York *Daily News* was also wrong; it was upheld on appeal.[283] However, the logic underlying the trade paper's editorial advice that most juries would be more sympathetic to the local newspaper than to these unknown businessmen appears to have some support. The awards levied against the New York *Daily News* and Youngstown *Telegram* were unusual—much smaller awards were more typical in Palmer's cases—and he chose not to follow through on other cases when the newspapers refused to settle them. Moreover, the

[281] "Palmer Loses," *Fourth Estate*, March 18, 1897, p. 2.
[282] "Palmer Loses," *Fourth Estate*, March 18, 1897, p. 2; see also "Dismissed Without Trial," Cleveland *Plain Dealer*, March 9, 1897 and "Vindicator Vindicated," *Newspaperdom*, March 18, 1897, p. 4.
[283] *Palmer v. New York News Pub. Co.*, 158 N.Y. 664 (N.Y. 1899).

newspapers that chose to settle the cases indeed paid more than what juries typically awarded, according to the *Fourth Estate*'s research.[284]

It is difficult to know for certain why the juries that handed Palmer or De Freitas small or nominal damage awards did so, but the contrast with the Juliette Smith and Edward Rutherford cases a few years earlier is worth attention. Jury members hearing the Palmer cases might have considered a false accusation of embezzlement not as offensive as jury members who heard the cases involving the false accusations of Smith and Rutherford's elopement. Citizens in Buffalo, New York, for example, might have been no more familiar with a socialite from Toronto than a light bulb salesman from Philadelphia, and jury members in either case would have heard testimony involving a similar lack of editorial care regarding wire service news. The fact that one Buffalo jury awarded Smith $4,000 in her case against the *Illustrated Express* in 1893 and another awarded Palmer a nominal six cents in his case against the same paper in 1897 suggests that the Palmer report was considered less intrusive or offensive than the one involving Smith, or that it was a more forgivable mistake.[285]

In another contrast to the Smith and Rutherford cases, it was the plaintiff Palmer, and not the newspaper publishers, who sought relief from the appellate courts in most cases.[286] The premise of Palmer's appeals was similar to that of the newspapers involved

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[284] "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22 1897, p. 1.
[285] See Smith v. Matthews, 152 N.Y. 152 (N.Y. 1897) and Palmer v. Matthews, 162 N.Y. 100 (N.Y. 1900).
[286] In all, this study examined 12 total appeals court rulings in the Palmer cases, 10 of which Palmer won on various procedural and evidential issues, some not related to the wire service or libel syndicate defenses or challenging a damage amount. For example, Palmer's three appeals in his case against the Utica *Observer* dealt with whether the

in the previous round of serial libel cases: he argued that erroneous jury instructions had led to the award of an inappropriate damage amount. But in the Palmer cases, the appellant argued the damage amount was smaller, not larger, than was fair. In appealing trial court decisions against the Pittsburgh *Leader* and the Buffalo *Illustrated Express*, Palmer argued that the juries' awards of nominal damages—six and one-quarter cents and six cents, respectively—should be overturned.[287] Palmer also appealed three successive trial court decisions in his case against the Utica, New York *Daily Observer*, arguing in each appeal that the trial court improperly allowed the *Observer* to present evidence in its defense.[288] In *Palmer v. New York News Publishing Co*., however, it was the *Daily News* that unsuccessfully appealed a New York City jury's award of $7,500 in damages to Palmer for publishing the false wire service report about his alleged embezzlement scheme.[289]

Several of the newspaper defendants in New York sought to cast doubt on Palmer's legal motives in the form of a libel syndicate defense, arguing that they should

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testimony of another Auer employee should be allowed or ruled hearsay. See Palmer v. E. P. Bailey & Co., 12 A.D. 6 (Sup. Ct. N.Y. App. Div. 1896), Palmer v. E. P. Bailey & Co., 21 A.D. 630 (N.Y. App. Div. 1897), Palmer v. E. P. Bailey & Co., 33 A.D. 642 (N.Y. App. Div. 1898). Palmer v. Mahin, 120 F. 737 (8th Cir. Iowa 1903) was related to his serial libel suits, and involved a publisher's claims that Palmer was a blackmailer and extortionist. There the court ruled that the statements were libelous *per se* and "the victim is as clearly entitled to full compensation for a wrong inflicted with a laudable motive, or through mistake or inadvertence, as from one perpetrated with a diabolical purpose or intent."

[287] Palmer v. The Leader Publishing Company 7 Pa. Super. 594 (Super. Ct. Penn. 1898) and Palmer v. Matthews, 162 N.Y. 100 (N.Y. 1900).

[288] See Palmer v. E. P. Bailey & Co., 12 A.D. 6 (Sup. Ct. N.Y. App. Div. 1896), Palmer v. E. P. Bailey & Co., 21 A.D. 630 (N.Y. App. Div. 1897), and Palmer v. E. P. Bailey & Co., 33 A.D. 642 (N.Y. App. Div. 1898).

[289] 31 A.D. 210 (N.Y. App. Div. 1898).

be able to present evidence about the number and success of Palmer's other lawsuits as a means of mitigating their own liability for damages. For example, the New York *Daily News* argued that the trial judge should have allowed the newspaper to introduce evidence showing that Palmer had sued numerous other newspapers for publishing the same article, and that his total claim of damages exceeded $200,000.[290] On the other hand, Palmer's appeal of his six-cent verdict against the Buffalo *Illustrated Express* was based in part on the contention that the trial court should not have allowed lawyers for the newspaper to question him on the witness stand about five letters he sent to the newspaper, one of which made the following reference to his numerous libel suits: "The financial loss to me from the publication as a whole was most serious. However, I do not expect any one paper to bear it all, but only its due proportion."[291]

The *Daily News* also sought to raise a wire service defense in order to limit its liability for damages. The paper's publisher testified in a pretrial hearing that "he did not consider it necessary in general to verify such items as he received from the United Press," because the *News* "had employed the United Press … for a considerable length of time, and that it placed confidence in the accuracy of the information which it received" from the wire service.[292] In an interesting twist, the trial judge allowed the newspaper to proceed with the wire service defense, but also allowed Palmer to introduce evidence that

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[290] Palmer v. New York News Pub. Co., 31 A.D. 210 (N.Y. App. Div. 1898).
[291] Palmer v. Matthews, 29 A.D. 149, at 155 (N.Y. App. Div. 1898) (Hardin, J. and Follett, J., dissenting). See also note 263 and accompanying text. An attorney for the newspaper claimed while cross-examining Palmer that the number was "152, or thereabouts," but Palmer's attorney objected to the question and refused to confirm that number.
[292] Palmer v. New York News Pub. Co., 31 A.D. 210, at 213 - 214 (N.Y. App. Div. 1898).

could undermine the contention that United Press was in fact reliable. Palmer called to the stand "the attorney in the action of Smith against this defendant (N.Y. News Publishing Co.), and proved by him that he brought an action against this defendant for libel on the 13th of June, 1890." Given the timing, the witness was in all likelihood an attorney for Juliette Smith in a libel suit against the *News*, and Palmer's intention was to show that the *News* had in fact recently been in a very similar situation for relying on false news relayed by the United Press, resulting in a libel case.[293]

New York City's intermediate appellate court knocked down the *Daily News*' attempts to assert both a libel syndicate defense and a wire service defense in June 1898, in a lengthy opinion that was affirmed without opinion by the state's highest court seven months later. Judge William Rumsey, citing Juliette Smith's successful case against the New York *Sun* and an 1897 libel case against New York *Herald* publisher James Gordon Bennett, wrote, "the true rule is and must be, that whoever publishes a libel, publishes it at his peril, and he cannot mitigate his damages because some other reckless or evil-disposed person has incurred the same liability that he has for the same story."[294] Addressing the libel syndicate defense, Rumsey explained, "when several persons unite

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[293] The story that alleged that Smith and Rutherford had eloped together was published in the New York papers around the second week of June 1890. See Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 243 (2d Cir. N.Y. 1893).

[294] Palmer v. New York News Pub. Co., 31 A.D. 210, at 212 (N.Y. App. Div. 1898), citing Bennett v. Salisbury, 78 F. 769 (2d Cir. N.Y. 1897) and Smith v. Sun Print. & Pub. Assn., 55 F. 240 (2d Cir. N.Y. 1893). Both the cited opinions were written by Judge Shipman of the 2nd Circuit U.S. Court of Appeals. In the Salisbury case, Shipman ruled that an award of punitive damages required a showing of reckless indifference to the rights of others, and that although Bennett was not personally acquainted with the Salisbury or aware of the story being published about him, the publisher could still be found to have demonstrated the requisite reckless indifference through the lax editorial policies of his paper.

in the publication of one libel, a tort is committed by each one of them for which he severally is liable to the plaintiff, and the plaintiff is entitled to a judgment against each one for all the damages which he suffers."[295] Addressing the *News*' contention that the jury should be allowed to consider the fact that the offending item was sent by a normally trustworthy wire service, Rumsey simply stated, "the fact that it was published in reliance upon the statement of some other person is not a defense."[296] The court ruled that the evidence that the *News* and Palmer presented concerning United Press' reliability, including the testimony offered by Smith's lawyer about an earlier suit against the *News*, were immaterial to the case.

The *News* also contested the $7,500 damage award as excessive, particularly because the trial judge instructed the jury that it could compensate Palmer for "the mental suffering, sense of shame and wounded honor which he has endured." Rumsey upheld the award, ruling that mental suffering, shame, and wounded honor are "elements of general damages which the jury may take into consideration" without being proven at trial. Moreover, Rumsey explained, Palmer's business "was one which involves grave responsibilities," and "no charge could be made against him that would be so destructive

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[295] Palmer v. New York News Pub. Co., 31 A.D. 210, at 212 (N.Y. App. Div. 1898). Rumsey made a somewhat awkward analogy to an imaginary case where "100 persons at 100 different places make 100 separate publications of a libel in 100 different newspapers." In that instance, Rumsey said, the person libeled by the 100 newspapers could sue each publisher, and no single defendant could "shelter himself behind the acts of the other 99, and say that 99/100 of the plaintiff's character was ruined by the others, and, therefore, he is liable for only 1/100 part of the damage." It was unclear from Rumsey's opinion whether the "100 separate publications" were meant to be of the same shared story or not.

[296] Palmer v. New York News Pub. Co., 31 A.D. 210, at 213 (N.Y. App. Div. 1898) citing Morey v. Morning Journal Ass'n, 123 N.Y. 207 (N.Y. 1890).

of his usefulness as the charge of dishonesty … the circumstances under which this charge was made and the nature of the charge were such as to seriously impugn his honesty and reliability."[297]

The case involving the Buffalo *Illustrated Express* resulted in a more equivocal ruling on the libel syndicate defense from New York's highest court. A lower appeals court ruled in favor of the newspaper in May 1898, denying Palmer's motion for a new trial and ruling that by taking the stand in his own defense and agreeing to discuss letters which he and the newspaper sent to each other following the publication of the allegedly libelous story, Palmer assumed a risk that information that was detrimental to his case could be raised in court.[298] The state's highest court reversed the lower court's decision in February 1900, however, focusing its analysis not on Palmer's decision to take the stand and testify about the letters, but on the content of the letters themselves, which included information about the other suits that Palmer had filed.[299] Judge Celora E. Martin, writing on behalf of the unanimous seven-member court, stated that "it is now too well settled to be questioned that the fact that others have published the same libel which was unknown to the defendant when the publication complained of was made, or that suits have been commenced against others for the publication of such libel, is inadmissible. The defendants in this case were liable, and that some one else was also liable was immaterial." Martin added that the proposition was "well established by the decisions in

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[297] Palmer v. New York News Pub. Co., 31 A.D. 210, at 216 (N.Y. App. Div. 1898).
[298] Palmer v. Matthews, 29 A.D. 149 at 153 (N.Y. App. Div. 1898). "As has been well said by an eminent jurist, 'A party who seeks to testify in his own behalf must take the risk if there are vulnerable joints in his harness.'"
[299] Palmer v. Matthews, 162 N.Y. 100 (N.Y. 1900).

this state, as well as in other jurisdictions," citing Judge Rumsey's opinion in the New York *Daily News* decision, the Second Circuit's 1893 ruling in Juliette Smith's case against the New York *Sun*, and several others in New York, the Seventh Federal Circuit, Illinois, and California.[300]

Appellate courts were no more likely to overturn a jury's verdict without evidence of prejudice or corruption in Palmer's cases than in the Smith and Rutherford cases, even though it was usually Palmer and not the defendant newspapers making the claim. The Pennsylvania Supreme Court, for example, explained that a Pittsburgh jury's award of nominal damages to Palmer was "not necessarily absurd."[301] In appealing the verdict, Palmer had argued that the trial judge wrongly instructed the jury that the minimal amount of damages would be sufficient. The appellate court disagreed with Palmer's interpretation of the instructions, however, finding that the judge had properly explained that any amount of damages, from nominal up through punitive, could be awarded. Palmer also argued that the award of nominal damages had amounted to a ruling that the newspaper did not harm his reputation. Again, the court disagreed, explaining that the jury's decision reflected nothing more than that, considering "where the newspaper circulated and the absence of evidence that the plaintiff resided or had business or social

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[300] Palmer v. Matthews, 162 N.Y. 100, 102-103 (N.Y. 1900), citing Tillotson v. Cheetham, 3 Johns. 56 (N.Y. Sup. Ct. 1808); Palmer v. New York News Pub. Co., 31 A.D. 210 (N.Y. App. Div. 1898); Gray v. Brooklyn Union Pub. Co., 35 A.D. 286 (N.Y. App. Div. 1898); Morrison v. Press Pub. Co., 14 N.Y.S. 131 (N.Y. Super. Ct. 1891); Mattice v. Wilcox, 147 N.Y. 624 (N.Y. 1895); Hatfield v. Lasher, 81 N.Y. 246 (N.Y. 1880); Smith v. Sun Printing & Pub. Asso., 55 F. 240, at 245 (2d Cir. N.Y. 1893); Enquirer Co. v. Johnston, 72 F. 443 (7th Cir. Ind. 1896); Wilson v. Fitch, 41 Cal. 363, at 383 (Cal. 1871); and Sheahan v. Collins, 20 Ill. 325 (Ill. 1858).

[301] Palmer v. The Leader Publishing Company 7 Pa. Super. 594 (Super. Ct. Penn. 1898).

relations therein[,] the jury were unable to find … that he suffered actual damages from the publication."[302]

New York appellate judges did not criticize the press through their opinions in the Palmer cases like they did in the Smith and Rutherford cases. Judge Rumsey probably came closest to taking a chiding tone in his opinion upholding the $7,500 award against the New York *Daily News*, asserting that the charges made about Palmer were "destructive," and "seriously impugn[ed] his honesty and reliability." Rumsey concluded that there was "no reason to suppose that the damages given by the jury were any more than fair and proper in view of all the circumstances which are made to appear in the case."[303] The language was a far cry from the outrage expressed by Bartlett over the press' attack on "the good name of an innocent wife and mother"[304] or by Lacombe in his rejection of the idea "that the public has such a right to be informed as to the private life of every individual."[305] In Palmer's second of three separate appeals of small jury verdicts in his favor against the Utica *Observer*, the New York appellate court ordered a new trial because the trial court admitted improper evidence, but seemed more exasperated with Palmer than with the *Observer*: "The case is barren of evidence to show express malice in the defendant in publishing the article, yet we cannot say that the

[302] Palmer v. The Leader Publishing Company 7 Pa. Super. 594 at 597 (Super. Ct. Penn. 1898).
[303] Palmer v. New York News Pub. Co., 31 A.D. 210, at 216 (N.Y. App. Div. 1898).
[304] Smith v. Matthews, 152 N.Y. 152, at 158 (N.Y. 1897).
[305] Morning Journal Asso. v. Rutherford, 51 F. 513, at 516 (2d Cir. N.Y. 1892).

rulings made to which we have alluded worked no harm to the plaintiff. Therefore a new trial must be ordered."[306]

Some of the newspapers involved in the Palmer litigation presented a defense in their own columns as well as in legal briefs. The *Republican* of Winona, Minnesota, in an October 6, 1894 story reporting that Palmer and De Freitas had sued the newspaper for $50,000 apiece, explained that it had mistakenly published the false accusation because the "dispatch was received in the usual course of business from a news agency … upon which [the *Republican*] relied for accuracy." When informed of the error, the paper "cheerfully and in terms unequivocal made full and complete retraction of said charges." Having stated its defense, the paper explained to its readership of possible jurors its rationale for fighting the case:

> Mr. Francisco De Freitas [sic] being at the time of this publication a resident of South America and Mr. Palmer engaged in business in London, in neither of which places *The Republican* circulated, it felt that neither of these men had suffered through the publication either in their property, trade, occupation, or good name, and believed, such being the case, that the retraction would be accepted. But retraction and vindication are not what these men were seeking.[307]

Other newspapers subtly shifted the blame for errors onto the wire services. The Youngstown *News*, in an editorial reprinted in *Newspaperdom* October 17, 1895, observed that "all are liable to make mistakes. The United and Associated Press make

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[306] Palmer v. E. P. Bailey & Co., 21 A.D. 630, at 631 (N.Y. App. Div. 1897).
[307] "Sued For One Hundred Thousand Dollars Damages," Winona, Minn. *Daily Republican*, Oct. 6, 1894; the suit was dismissed when neither the plaintiffs nor their attorney showed for a preliminary hearing, and the suit never went to a jury; see "Exit Tyndale Palmer," Winona, Minn. *Daily Republican*, March 5, 1895.

them nearly every day of the year. … The newspapers using the service of these two news gathering associations make a big mistake in calling the attention of the public to the blunders made by these creditable institutions."[308] It is likely that the *News* wanted to avoid suits like the ones the local *Vindicator* and *Telegram* had faced, and its publishers believed that the more the local newspapers reported incidents like the one involving Palmer, the more likely serial libel suits like his would become. This rationale was also evident in the aforementioned Detroit, Boston, and Cincinnati newspapers' agreement to remain silent about libel in an attempt to limit lawsuits.

A few days after a jury in Jackson, Michigan awarded Palmer $100 (he had asked for $25,000) the Jackson *Citizen Patriot* sought to burnish its reputation and reiterate its legal defense. "The Citizen printed the dispatch in good faith, as a matter of news, coming through a channel it regarded and had always found reliable," the paper explained. Readers should be more troubled by the waste of public resources than by the harmless mistake, it continued: "Palmer secures $100; the people of Jackson County pay over $184 in additional court expenses created by the suit. And the Citizen, which had no malice against Palmer or anybody else, and did no intentional or actual wrong, is required to pay $100." The newspaper further sought to dissuade future libel plaintiffs, observing that, after Palmer paid his lawyer's fees, the remainder of his damage award "will scarcely cover his railroad and boarding house expenses here."[309]

Palmer "won" most of his cases in the sense that the newspapers were considered liable for harming his reputation, and appellate courts upheld a libel law doctrine that did

[308] "It Depreciates All News," *Newspaperdom*, Oct. 17, 1895, p. 8.
[309] "That Suit For Libel," Jackson, Mich. *Citizen Patriot*, Dec. 13, 1895.

not forgive errors based on use of the wire services or allow evidence that Palmer was a serial plaintiff, a doctrine that the New York judges referred to as "too well settled to be questioned" and "the true rule."[310] However, juries tended not to award Palmer nearly the large amounts he claimed, nor nearly the amounts that Smith or Rutherford recovered in their earlier serial libel suits. The frequent awards of nominal damages indicated, as the trade press argued, that juries were not offended by the content of the false article about Palmer in the same way that they were by the article about Smith and Rutherford. As the appellate courts generally reinforced an inflexible libel doctrine, the jury awards in the Palmer cases demonstrated that the doctrine could also operate in the press' favor when jurors found that a report was libelous but not very harmful and that the subject matter of the story, true or false, was not an offensive invasion of privacy.

Although it is not possible to know the specific reasoning of any one jury, the distinctly different interpretations provided by two appellate judges provide some insight. Palmer's largest award, the $7,500 granted by a New York jury against the New York *Daily News*, was affirmed by Rumsey and later the state's highest court. Rumsey argued against the *News*' claim that the award was excessive, contending that the false allegation to its 100,000 readers that Palmer had stolen thousands of dollars was a serious blow to a man who relied on the "the confidence of those who employed him."[311] It is reasonable to conclude that the thinking of the New York jury was similar to that of Rumsey, precipitating a large damage award. In Pennsylvania, on the other hand, the state supreme

[310] Palmer v. Matthews, 162 N.Y. 100, 102-103 (N.Y. 1900) and Palmer v. New York News Pub. Co., 31 A.D. 210, at 212 (N.Y. App. Div. 1898).
[311] Palmer v. New York News Pub. Co., 31 A.D. 210, at 216 (N.Y. App. Div. 1898).

court ruled that it was just as likely that Palmer's limited business or social connections in Pittsburgh led to jurors' difficulty in finding specific harm done to him by the local paper's publication of the false story, resulting in an award of six and a quarter cents; nominal damages.[312] In the blunter terms of the *Fourth Estate*, the plaintiff "might just as well have lived with the man in the moon."[313]

Legal problems that newspapers faced were also a matter for the court of public opinion, a realm in which they had unmatched potential for influence. There is limited evidence available showing that newspapers sued by Palmer appealed to their readers for support, and even where such an editorial approach can be found it would be difficult to show a link between the newspaper's coverage and a trial's outcome.[314] However, newspapers did cover the cases in their own pages, and at least two sought to polish their image as protectors of the public's right to know in the context of libel suits. Priming an audience of potential jurors about the altruistic intentions behind mistakenly printing a libel, as the Winona, Minnesota, *Republican* did, had potential benefits when the trial began. The paper also provided a forum to assert a lack of negligence after the trial ended, as was the case with the Jackson *Citizen Patriot*. However, the benefits of giving greater attention to libel cases and their plaintiffs were debated among the press.

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[312] Palmer v. The Leader Publishing Company 7 Pa. Super. 594 at 597 (Super. Ct. Penn. 1898).
[313] "Tyndale Palmer's Suits," *Fourth Estate*, March 18, 1897, p. 6.
[314] The research for this study included several full text newspaper databases for keywords related to the cases, including Proquest's America's Historical Newspapers, The Library of Congress' Chronicling America: Historic American Newspapers, Gale/Infotrac's Nineteenth Century U.S. Newspapers, and Fold3/Ebscohost's Footnote. Approximately 40 newspaper articles were collected that mentioned Palmer, De Freitas and their suits, but few of those went beyond basic reportage.

Coverage of an ongoing trial could carry the threat of contempt of court,[315] and members of the journalistic community worried that covering the cases might encourage more of them—a strategy in direct conflict with the journalistic value of the people's right to know.[316]

Trade publications gave tepid support to the idea of coverage embargoes on libel suits as a means to slow the creeping tide of libel litigation,[317] and reminded publishers that, in light of such cases "the vigilance of the copy editor should be in no degree relaxed,"[318] but they expended more ink in the midst of the Palmer cases encouraging newspapers to fight, rather than settle, the cases that arose. The rationale presented by the *Fourth Estate* was twofold. In the particular cases of Palmer and De Freitas, juries were likely to award damage amounts smaller than the average settlement because of their lack of familiarity with the plaintiffs and a perception that the alleged libel at the center of the suit was not a harmful or offensive one. Moreover, though, the Palmer cases represented a larger concern about the growth of similar types of legal campaigns, and some journalists believed that the best way to discourage other potential Palmer-like plaintiffs was to demonstrate that "the bringing of libel suits against newspapers is not likely to be found a sure avenue to riches." The trade paper's own research into the cases helped its

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[315] This is discussed in greater detail in the next chapter.
[316] Such a lacuna of trial coverage has the potential for a far-reaching negative impact on the study of nineteenth century libel below the appellate level, where newspapers often offer the only source of information where other records have disappeared.
[317] See "Do Not Publish News of Libel Suits," *The Fourth Estate*. July 8, 1897, p. 1.
[318] "A Libel Suit that Fizzled," *Newspaperdom*, vol. 4, p. 477, April 1894. Reporting on an 1894 Palmer case against the Alton, Illinois *Sentinel-Democrat*.

editors conclude that the Palmer suits "prove[d] … that mulcting of newspapers innocent of wrong intention is not easy to any bringer of libel suits."[319]

The trade press encouraged newspapers to fight libel suits in order to discourage serial libel plaintiffs like Tyndale Palmer in spite of the courts' general unwillingness to recognize a wire service or libel syndicate defense that was linked to the professional practices of the press. The pragmatic advice reflected a conception that juries were likely to favor the press and award nominal damages even if appellate judges were not. Palmer's serial cases reflected the pinnacle meeting point of the perils of "bad" news created by speed of the industrialized press and the entrepreneurial spirit of a plaintiff attempting to take advantage of legal indeterminacy.

[319] "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897, p. 1.

V.

The Butler Cases: Libel and Celebrity

Annie Butler, unlike Juliette Smith, Edward Rutherford, J.F. De Freitas, or Tyndale Palmer, was well known to the general public long before she made headlines as a serial libel plaintiff. Butler, born Annie Moses, the daughter of a poor farming family in Darke County, Ohio in 1860, developed a skill for shooting when she was a teenager, using a shotgun to take game which she sold to local grocers in order to help feed her family.[320] In 1881, Moses met Frank Butler, a member of a traveling sharpshooting duo, when she accepted a challenge to face him in a shooting contest. The two married a year later and began working together in show business, with the new Mrs. Butler taking the stage name "Annie Oakley."[321] By the 1890s, Annie Oakley had garnered a modest fortune and great fame across the United States and Europe as the spunky and ladylike crack shot who was a keystone in the wildly popular traveling circus known as Buffalo Bill's Wild West show.[322]

By 1903, the Butlers were living in semi-retirement in New Jersey, having left the Wild West show a year earlier. On August 11 of that year, three Chicago papers—the *American*, *Examiner*, and *Tribune*—reported that the famous Annie Oakley had been arrested, charged, fined, and sentenced to jail the previous morning at the Harrison Street

[320] Kasper, *Annie Oakley*, 7-9.
[321] Kasper, *Annie Oakley*, 16-28.
[322] See generally Kasper, *Annie Oakley*; and Riley, *The Life and Legacy of Annie Oakley*.

police court for stealing a man's pants in order to buy cocaine.[323] The irresistible story promptly spread via the Scripps-McRae and Publishers Press wire services, and soon papers across the country were reporting the arrest with headlines like "Annie Oakley at the Bottom of Toboggan"[324] and "Fall of Annie Oakley."[325] According to the version printed in the Scranton, Pennsylvania *Truth*, Oakley begged the Chicago judge: "I plead guilty, your honor, but I hope you will have pity upon me. An uncontrollable appetite for drugs has brought me here. I began the use of it years ago, to steady me under the strain of the life I was leading, and now it has lost me everything. Please give me a chance to pull myself together." The papers reported that "the striking beauty of the woman, whom the crowds at the World's Fair admired, is gone. Although she is only twenty-eight years old, she looks almost forty."[326]

The "real" Annie Oakley—Annie Butler—read the story while on vacation in Atlantic Highlands, New Jersey, not in a jail cell in Chicago; friends sent her copies of it clipped from newspapers across the country, and she reacted swiftly and angrily. On August 12, she wrote to the Brooklyn *Union Standard*, "Woman posing as Annie Oakley in Chicago is a fraud," adding that she had "not been to Chicago since last winter" and that rather than destitute she owned "property enough to live on. … Now that you have done me an injustice in publishing that article, I hope you will contradict it." To the

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[323] Louis Stotesbury, "The Famous 'Annie Oakley' Libel Suits," *The American Printer*, vol. 40, no. 6, p. 533, 584-5 (Aug. 1905).
[324] Headline in Richmond, Va. *News-Leader*, see Butler v. News-Leader Co., 104 Va. 1 (Va. 1905).
[325] Headline in Cincinnati, Ohio *Post*, see Post Pub. Co. v. Butler, 137 F. 723 (6th Cir. Ohio 1905).
[326] Quoted from Scranton *Truth* in Butler v. Barret & Jordan, 130 F. 944, at 946 (C.C.D. Pa. 1904).

Philadelphia *Press* the next day she jotted, "Contradict at once. Someone will pay for this dreadful mistake."[327]

Butler had been the subject of false press reports before. While the Wild West show was touring Europe, reports had surfaced that she was engaged to an English nobleman. In December of 1890 and January 1891, while she was spending Christmas in England with her husband, French newspapers reported that she had died. American newspapers picked up the story shortly thereafter and her obituary was published across the country. The Butlers appeared to take the incident mostly in stride, spending several days of their holiday sending hundreds of letters and telegrams to newspapers, friends, and family correcting the mistake. But Frank Butler confided to a friend that the episode "affected Annie terribly" although she did not say so.[328] Butler owed much of her notoriety and success to frequent and favorable news coverage, and she knew it. In 1894 she told the New York *Press*, "I guess the press has made me famous. But you know, some really peculiar things have been said." The false story about drug-induced larceny amid squalor in Chicago was more than "peculiar," however. The "terrible piece … nearly killed me," she told the Joliet, Illinois *Daily News* in 1906. "The only thing that kept me alive was the desire to purge my character."[329]

The Butler cases stand in contrast to the other cases examined here in key ways, and they also represented a turning point in the serial libel cases' contributions to legal and social consciousness related to journalism and freedom of the press and their

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[327] Kasper, *Annie Oakley*, 174-175.
[328] Kasper, *Annie Oakley*, 112-113, 118, 174.
[329] Kasper, *Annie Oakley*, 175, citing Joliet, Ill. *Daily News*, Oct. 3, 1906.

conceptual link to technology. Butler's identity as a celebrity influenced ideas about an acceptable journalistic report that were reflected in her serial libel suits. Butler's prominence led the story of tragic downfall to be widely and quickly published and republished. Her celebrity also played a key role in her success at the trial level, as did the offensiveness of the story, as opposed, for example, to the earlier false reports of marriage or premature death. At the same time, however, newspapers used Butler's celebrity and the notoriety of her serial cases to help advocate for legislative responses to the perceived threat of serial libel cases in ways that they did not with the earlier cases. The advocacy for legislative action represented an alternative for newspapers targeted by serial libel suits to simply fight out the cases in court, where few judges or jurisdictions had recognized wire service defenses or libel syndicate defenses and the Butler cases showed that juries were not always reliably press-friendly.

Many of the newspapers that published the report of Annie Oakley's downfall retracted or clarified it as soon as they heard from Butler or the wire services that it was erroneous, but Butler filed fifty-five lawsuits against newspapers across the country anyway. For the next seven years, the libel suits consumed much of Annie and her husband's time and energy. Her biographers have argued that the incident illustrates a fierce pride that both Annie and Frank Butler took in the public image of Annie Oakley. One biographer said Frank had a "near preoccupation with denouncing all impostors and maintaining the purity of Annie's reputation. The taint of a drug charge would destroy Annie's clean-cut image for all time."[330] Another argued, "reputation mattered more than

[330] Riley, *The Life and Legacy of Annie Oakley*, 77-78.

anything else to Annie Oakley, more even than money."[331] Butler's public image was vital to her livelihood, and the fact that she did not sue over earlier false reports of her marriage or death suggests that the story of destitution and cocaine addiction posed an especially serious threat to that image. Money played a significant role in the ongoing campaign, even if only because winning one suit helped to pay for the expenses related to the others. In a 1910 letter to *Forest and Stream*, Frank Butler wrote that contrary to popular opinion, the numerous suits did not result in great wealth. "I only wish it was true," Butler wrote, "but any one [sic] who has had any lawsuits knows that they cost money, and wherever it was possible to do so she had the best attorneys. They come high, but are the cheapest in the end."[332] On the other hand, a look at the amounts that Butler was awarded by juries and received in settlements suggests that the libel campaign was at least a somewhat lucrative affair. In the first three years of her seven years of litigation, according to journalistic and appellate records, Butler accrued over $42,000 in damages and settlements in 27 lawsuits.[333]

Like Tyndale Palmer, Butler claimed damage amounts in the tens of thousands of dollars in her lawsuits. However, Butler tended to win larger amounts than the nominal damages mostly awarded to Palmer, figures closer to the amounts awarded to Smith and Rutherford. An extensive report on the Butler cases compiled by Publishers Press Association attorney Louis Stotesbury and published by *The American Printer* in 1905

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[331] Kasper, *Annie Oakley*, 175.
[332] Letter to the editor from Frank Butler, *Forest and Stream*, April 30, 1910, p. 709.
[333] This inexact figure is based on the list published in August 1905 in Stotesbury, "The Famous 'Annie Oakley' Libel Suits," the account of the case against a Chicago paper in *Forest and Stream* Oct. 10, 1906, p. 667, and on discussion of damage amounts in the twelve appellate opinions reviewed in this study.

listed fifty of Butler's suits, with the smallest claims being $5,000 against two papers in Dayton, Ohio, the *Journal* and *Herald*, as well as the Richmond, Virginia *News Leader*. Butler sued fourteen of the papers for $10,000, nineteen of them for $25,000, the Scripps-McRae wire service for $30,000, Publishers Press for $50,000, and the Toledo, Ohio *Times and News Bee* for $75,000. The list included nine suits in which juries had rendered verdicts against the newspapers, including $5,000 against the New Orleans *Times-Democrat*, $3,000 against the Hoboken, New Jersey *Observer*, and $900 against the Scranton, Pennsylvania *Truth*.[334] In addition, the October 27, 1906 issue of *Forest and Stream* reported that a jury had awarded Butler $27,500 against "one of the yellow journals of Chicago." Although the magazine did not identify the newspaper, it was probably either the *American* or the *Examiner*, both of which were owned by William Randolph Hearst, who was known for advocating a more sensationalistic approach to journalism.[335] The 1905 *American Printer* report listed several settlements. Although the settlement amounts were less than what Butler claimed in her suits against those papers, in contrast to the Palmer cases, the settlements in the Butler cases were generally smaller than the average trial court awards of several thousand dollars.[336] For example, the Des Moines *News*, *Capital*, and *Register Leader* paid Butler $750 apiece to settle their suits. The St. Louis *Globe-Democrat* paid $1,250. Meanwhile trial judges also reduced some verdicts, finding that they were excessive; for example the $5,000 award against the New

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[334] Stotesbury, "The Famous 'Annie Oakley' Libel Suits," 584.
[335] *Forest and Stream* Oct. 10, 1906, p. 667. Other details about this particular trial have been difficult to verify. Kasper's discussion of the case cites the Jan. 29, 1909 edition of *Forest and Stream*, an issue that does not appear to exist.
[336] A list of the trial court awards reported by Stotesbury in the *American Printer* is available in the appendix, in Table Three.

Orleans paper had originally been $7,500.[337] The *Fourth Estate* reported that a trial judge in Cincinnati lowered a verdict against the Cincinnati *Post* from $9,000 to $2,500.[338] In Rochester, New York, juries hearing cases against the *Times* and *Herald* could not agree on a verdict and were dismissed.[339]

Butler won eight of the twelve suits heard by appellate courts. In appeals where the wire service and libel syndicate defenses arose, appellate court reasoning was less concerned with emphasizing the carelessness of the newspapers than in earlier serial libel cases, and more concerned with whether the newspapers' or Butler's claims squared with specific procedural details and evidentiary rules, suggesting that the wire service and libel syndicate defenses had become more commonplace. In cases involving both the Scranton *Truth* and Cincinnati *Post*, the newspapers argued that trial judges erred in refusing to admit depositions related to the initial reporting of the stories in Chicago, evidence that could allow them to mitigate their damages in addressing whether the report that the wire services shared with member newspapers was reliable and whether their use of it was reasonable or reckless.[340] In both cases, the appeals courts ruled that testimony or evidence related to exactly what happened in Chicago that fateful morning would prolong and complicate the proceedings with irrelevant details. A Pennsylvania U.S. District Court ruled that "to allow [the Scranton *Truth*] to … lay before the jury all that was said

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[337] Stotesbury, "The Famous 'Annie Oakley' Libel Suits," 584.
[338] "Oakley Damages Reduced" *Fourth Estate*, July 9, 1904, p. 3. See Post Pub. Co. v. Butler, 137 F. 723 (6th Cir. Ohio 1905). The *Fourth Estate* report noted that Butler "settled some of her other libel suits for amounts considerably less than $1,000."
[339] Stotesbury, "The Famous 'Annie Oakley' Libel Suits," 584; see also "Mrs. Butler Wins One Libel Suit," *Fourth Estate*, March 26, 1904, p.3.
[340] Butler v. Barret & Jordan, 130 F. 944, at 946 (C.C.D. Pa. 1904) and Post Pub. Co. v. Butler, 137 F. 723, at 728 (6th Cir. Ohio 1905).

and done—relevant and irrelevant—in and about the Chicago police court, which gave rise to the article, of which neither the defendants nor the readers of their paper had the slightest knowledge, would be to obscure the issue, and divert attention from the real inquiry."[341] Meanwhile, the 6th Circuit U.S. Court of Appeals simply ruled that although the facts might show how the Scripps-McRae Press Association gathered and sent the story to subscribing papers, including the Cincinnati *Post*, the facts were irrelevant because they "were not known to the defendant prior to the publication, and therefore could in no degree have affected its action."[342]

The court in the Scranton *Truth* case also rejected that newspaper's assertion of a wire service defense, citing heavily to Judge Emile Lacombe's earlier rebuttal of the *New York Morning Journal* and its "reckless indifference to the rights of others."[343] Judge Robert Wodrow Archbald wrote that not only had the *Truth*, like the *Morning Journal* over twelve years earlier, failed to investigate the story before printing it, "in the present instance … there was the added circumstance that the original journal had published an intermediate retraction."[344] In other words, the *Truth* could not defend itself by saying that it relied on the accuracy of the Philadelphia *Press* story it had copied when, before the *Truth* even printed its version, the *Press* had retracted the original.

In an order granting a motion for a new trial between Butler and The Hoboken *Observer*, the New Jersey Supreme Court effectively tossed out the *Observer*'s assertion of a libel syndicate defense, ruling that the trial judge "properly overruled testimony to

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[341] Butler v. Barret & Jordan, 130 F. 944, at 948 (C.C.D. Pa. 1904).
[342] Post Pub. Co. v. Butler, 137 F. 723, at 728 (6th Cir. Ohio 1905).
[343] See Morning Journal Asso. v. Rutherford, 51 F. 513 (2d Cir. N.Y. 1892).
[344] Butler v. Barret & Jordan, 130 F. 944, at 950 (C.C.D. Pa. 1904).

show the particulars of actions brought against other newspapers for publishing a similar libel and the amount of damages received in some of those suits."[345]

On the other hand, a bit of crafty lawyering allowed one newspaper to sidestep evidentiary rules that otherwise could have undercut a libel syndicate defense. In Butler's suit against the Elmira, New York *Daily Gazette and Free Press*, just as in Tyndale Palmer's suit against the Buffalo *Illustrated Express*, a question arose as to whether the fact that the plaintiff had filed numerous suits against other newspapers could be introduced as evidence when it came up in cross examination, as opposed to being formally offered as part of the record by the defendant.[346] At trial, a lawyer for the *Daily Gazette and Free Press* asked Annie Butler how many times she had been a witness, and whether it was more than a dozen. "No, sir" was her reply, but then "in response to further questions along this line, testified that she had been a witness twice in Rochester and once in Scranton; that she also had been a witness in Newark, New Orleans, St. Louis, Topeka, Cincinnati, Toledo, Charleston and in Buffalo, and then said perhaps she had been a witness a dozen times."[347] Butler's attorney objected to the line of questioning as a violation of the rules of evidence. The jury awarded Butler six cents, which she appealed, claiming that the meager award was the result of the jury being made aware of her other suits.

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[345] Butler v. Hoboken Printing & Publ'g Co., 73 N.J.L. 45, at 47 (Sup. Ct. 1905). The judge cited no case law or other authority.
[346] Butler v. Gazette Co., 119 A.D. 767 (N.Y. App. Div. 1907). See also note 291 and accompanying text.
[347] Butler v. Gazette Co., 119 A.D. 767 at 770 (N.Y. App. Div. 1907).

Judge Alden Chester of the intermediate New York appeals court ruled that the cross-examination was not improper.[348] Chester wrote that although "the rule is well settled that a defendant cannot show in mitigation of damages that the plaintiff has commenced actions against other papers for publishing the same libel," the trial court did nothing improper in allowing the newspaper's lawyer to correct Butler when she said she had taken the stand in fewer than a dozen similar libel cases because both sides had stipulated that evidence from several of Butler's other actions would be admitted in her case against the *Gazette*, and "if the jury inferred from these facts that these other actions were libel suits, and that still others brought by the plaintiff were pending, because of the number of times she had been sworn as a witness, the inference did not arise because of any violation of the rule of evidence."[349]

Chester's opinion went further, allowing evidence related to a wire service defense to stand as well. Butler claimed in her appeal that the trial judge should not have admitted evidence related to the initial reporting of the stories in Chicago and their transmittal through the wire services to the *Daily Gazette and Free Press*, but Chester rejected this argument, ruling that because "the great weight of authority is to the effect that there can be no award of punitive or exemplary damages except upon proof either of actual malice or that the libel was recklessly or carelessly published by the defendant … the plaintiff is entitled to show and to have the jury consider anything which tends to establish the existence of such malice or intensify its degree, and … on the other hand the

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[348] Butler v. Gazette Co., 119 A.D. 767, at 771 (N.Y. App. Div. 1907).
[349] Butler v. Gazette Co., 119 A.D. 767, at 770-771 (N.Y. App. Div. 1907) citing Palmer v. N. Y. News Publishing Co., 31 A.D. 210 (N.Y. App. Div. 1898) and Palmer v. Matthews, 162 N.Y. 100 (N.Y. 1900) for the "well settled rule."

defendant is entitled to bring to the consideration of the jury any circumstances which legitimately tend to disprove or lessen the degree of such malice."[350]

Lastly, Butler argued that the trial court erred in instructing the jury that the *Daily Gazette and Free Press* was not bound to personally investigate the story about Annie Oakley if the jurors found that such an investigation would not have resulted in a different outcome. Again, Chester rejected Butler's claim, stating that "vigilance would not have prevented the publication" and therefore "the defendant was not bound personally to investigate the truth of the item in the foreign State."[351]

The appeals courts in the Butler cases also confronted a question unrelated to the wire services or libel syndicate, and unique among the serial libel cases reviewed in this study, the element of identification: whether Annie Butler could sue over a newspaper story that did not use her actual name. Most courts ruled that because Butler was widely known for her unusual talent, she could be identified as Annie Oakley. For example, the *Metropolis* of Jacksonville, Florida argued that its allegedly libelous report did not identify Butler by name—rather it discussed only Annie Oakley—and Butler's complaint did not sufficiently "show on its face that the defamatory words were published of and concerning the plaintiff, Mrs. Frank E. Butler."[352] The 5th Circuit U.S. Court of Appeals rejected the *Metropolis*' claim because Butler had presented sufficient evidence showing

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[350] Butler v. Gazette Co., 119 A.D. 767, at 773 (N.Y. App. Div. 1907) citing Smith v. Matthews, 152 N.Y. 152 (N.Y. 1897).
[351] Butler v. Gazette Co., 119 A.D. 767 (N.Y. App. Div. 1907).
[352] Butler v. Carter & R. Pub. Co., 135 F. 69, at 71 (5th Cir. Fla. 1905). Relatedly, the question before the 5th Circuit U.S. Court of Appeals in the case involving the New Orleans *Times-Democrat* was whether, under Louisiana law, Annie Butler could sue for damages in her own name or Frank Butler had to bring the suit on her behalf. See Times-Democrat Pub. Co. v. Mozee, 136 F. 761 (5th Cir. La. 1905).

that "the publication not only refers to the plaintiff by a name by which she was known, but that it refers to her vocation and skill, both of a kind unusual with women."[353] The Wilmington, Delaware *Every Evening* argued that a verdict for $3,600 should be overturned because the trial judge failed to instruct the jury that the defendant newspaper "must have actually intended [the defamatory story] to refer or apply to the plaintiff," and further contended that proof that "ordinary readers … believe[d] that it referred to her" was not sufficient to find in favor of Butler.[354] The 3rd Circuit U.S. Court of Appeals rejected the *Every Evening*'s argument, finding instead that "it was competent for the jury to find, and we may add that we think they were justified in finding, that the plaintiff was the person meant in the publication in question." The court added, "however such antecedent mistake might morally excuse the one who made it, it cannot legally excuse the perpetrator of the libel caused by that mistake, or relieve him from responsibility for the injury to the plaintiff resulting therefrom."[355]

On the other hand, the Supreme Court of Virginia upheld a jury's finding in favor of the Richmond *News-Leader* over Butler's appeal challenging the trial court's instructions to the jurors that if they believed the evidence showed "that the article … did not refer to the plaintiff," and that the article in question was not likely to lead those who knew Butler to believe it described her, "then they must find for the defendant." After a lengthy explanation of the confusing situation involving the woman jailed in Chicago and her claim to be Annie Oakley, Justice James Keith wrote that the "evidence wholly

[353] Butler v. Carter & R. Pub. Co., 135 F. 69, at 71-72 (5th Cir. Fla. 1905).
[354] Butler v. Every Evening Printing Co., 140 F. 934, at 935 (C.C.D. Del. 1905).
[355] Every Evening Printing Co. v. Butler, 144 F. 916 at 920 (3d Cir. Del. 1906).

negatives actual malice," adding "where newspapers lightly and recklessly publish what is offensive and injurious to a citizen, courts and juries should hold them to a strict accountability," Keith wrote. "But it is by a reasonable enforcement of the law and not by its harsh and strained construction that the best interests of society are subserved. … It is the business of a newspaper to give news. The public demands it, and it is a condition of its existence, and we cannot discover from this evidence any ground whatever upon which to rest a claim for damages against the defendant in error."[356]

Discussion of whether the stories actually referred to Butler by wrongly naming Annie Oakley as the woman who appeared in the Chicago police court naturally led to questions about how the story was gathered and disseminated; questions related to the professional standards of journalists that were related to the wire service and libel syndicate defenses. According to Stotesbury's report, the story drew some scrutiny among reporters and editors before it was disseminated. Chicago *American* reporter George Pratt, who was among the first to report the story, was also familiar with the Wild West show and some of the people connected to it, and had questioned the woman extensively in her jail cell about the show and her role in it, satisfying his skepticism about her identity. Moreover, a Scripps-McRae wire service manager in Cleveland, having read the story in the Chicago *Tribune* on the morning of August 11, instructed a Chicago-based reporter, Ernest Stout, to follow up on it before sending it out via the Scripps-McRae and Publishers Press Association wires. Stout verified the *Tribune* story with a police inspector at the Harrison Street station before writing up his version and

[356] Butler v. News-Leader Co., 104 Va. 1 (Va. 1905).

sending it out on the wire.[357] In other instances, however, the story was received and published with no more fact-checking than had been the case in the stories involving Smith and Rutherford or Palmer and De Freitas, because, as the Cincinnati *Post*'s telegraph editor later explained in court, "it was an interesting news item because of the celebrity of the person involved."[358]

Coverage of the cases in the court of public opinion, which was much more robust than in the other serial libel cases in this study, was undoubtedly due to the celebrity of the plaintiff. Some reports about the trials, and particularly Butler's appearances on the witness stand, were complimentary while being framed by gender. Stories contrasted the grinning circus performer who pranced around the arena with the woman who appeared in court, a "cultured lady in every respect," who was conservatively dressed and whose voice was "well modulated and low" and whose features were "refined and almost classical."[359] Members of the public also came to Butler's defense in the press. In his 1910 letter to *Forest and Stream*, Frank Butler offered "a word of thanks to the shooting papers and sportsmen of America, who not only helped to win out, but when the article was published, first, came to her aid with strong editorials and hundreds of letters, all of which cheered and encouraged" Annie.[360]

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[357] Stotesbury, "The Famous 'Annie Oakley' Libel Suits," 583-584.
[358] Post Pub. Co. v. Butler, 137 F. 723, 725 (6th Cir. Ohio 1905).
[359] Kasper, *Annie Oakley*, 177, 180; citing six clippings from Butler's scrapbook dated from 1904. Kasper wrote that in the years following the suits, Butler's relationship with the press improved quickly.
[360] Letter to the editor from Frank Butler, *Forest and Stream*, April 30, 1910, p. 709. According to biographer Glenda Riley, "throughout the trials, an overwhelming number of Annie's fans, friends, sporting journal writers, shooters and other supporters sent her clippings and wrote letters of support." Riley, *The Life and Legacy of Annie Oakley*, 79.

The Butler suits also prompted familiar strategic advice from the trade press and newspapers, as well as calls for legislation to stem the tide of serial libel litigation. The trade papers continued to encourage papers to "fight every libel suit to the last ditch" amid the Butler suits.[361] The advice rested on the principle that juries tended to side with newspapers, and that taking a strong legal stance, rather than capitulating to settlement demands, discouraged other plaintiffs. *The American Printer*, in a 1905 editorial, did not mention the Butler cases directly, but argued that the press largely had itself to blame for "the current existence of a horde of dishonest, tenth-rate lawyers" who created a "false economy of money time and labor" by blackmailing newspapers.[362] In the Butler cases, however, there was some evidence that the conventional wisdom with regard to jury awards did not necessarily hold true. From the available record, the average settlement amount was less than what juries tended to award Butler.[363] When attorney fees are factored in along with the uncertainty of a jury trial, the Butler cases might offer a good exception to the fight-it-out rule, rather than further proof to support it.

The *Fourth Estate* focused on the lack of justice in a doctrine that limited newspapers' opportunities to argue that libel was accidental and would require them to thoroughly check every fact republished from other sources. A lengthy description of the Scranton *Truth*'s 1904 trial, for example, explained that the newspaper's lawyers

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[361] "To the Last Ditch" *Editor & Publisher* Jan. 23, 1904, p. 4. See also "Treatment of Certain Libel Cases by New York 'Press,' *American Printer*, July 1905, p. 446.
[362] "Treatment of Certain Libel Cases by New York 'Press,' *American Printer*, July 1905, p. 446.
[363] As of 1905, according to Stotesbury's report, the average settlement amount for the ten papers that agreed to them was about $800. The average award for the nine that went to trial was almost $2,200. Louis Stotesbury, "The Famous 'Annie Oakley' Libel Suits," *The American Printer*, vol. 40, no. 6, p. 533, 584-5

resigned themselves to a verdict in favor of Butler when it became clear that the judge was likely to uphold the traditional evidentiary standards. The jury's $900 award "was not a surprise to the defense, as they had no law to sustain their contentions and unfortunately were without any evidence except what they managed to draw from the plaintiff in their favor while she was under cross-examination."[364] The appellate record in the Butler cases provides further evidence that newspapers were little more likely to persuade a judge to recognize a wires service defense or libel syndicate rule on appeal than at the trial level.

The rise in libel suits through the end of the nineteenth century had prompted profession-wide pushes for new libel laws that benefitted the press,[365] but the Butler cases helped spark a resurgence of reform talk. In December 1904, the *Fourth Estate* linked the Butler cases to those of Tyndale Palmer and "other occasions [when] the newspapers of the United States have been subject to a libel raid … claiming damages aggregating to a fabulous sum" in urging publishers to help "stop wholesale actions." The report noted that the English Parliament had enacted legislation "providing for consolidation of such actions," and argued "such a measure ought to be enacted in the legislature of every state in the Union."[366] Indeed, in 1905 legislators in California proposed just such a measure.[367] In 1906, a congressman from Ohio proposed a federal consolidation law.[368]

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[364] "Mrs. Butler Wins One Libel Suit," *Fourth Estate*, March 26, 1904, p. 16.
[365] See discussion in Chapter II.
[366] "Publishers Urged to Act," *Fourth Estate*, December 24, 1904, p. 2.
[367] "A Bill to Protect Publishers in Libel Cases," *Los Angeles Times*, Feb. 6, 1905.
[368] "Oakley Suits Produce Bill to Stop Harvests," *The Washington Times*, evening ed., Jan. 10, 1906, p. 9.

The collective discourse surrounding the Butler cases represent several important aspects of the serial libel issue that affected changes in the social consciousness related to the idea of a report and press freedom. Conceptual links to technology appear to have largely dropped out of the discussion of a wire service or libel syndicate defense by the early 1900s, leaving behind discussions of malice that focused on professional standards and practices. Appellate court discussion also moved away from broad discussions of the potential legal protections focused on newspapers' important role in society that was evident in the earlier serial libel cases, and moved more toward the niceties of evidentiary standards. Journalists and their advocates began to turn toward legislative solutions and away from the court-based solutions that had proven largely unsuccessful and increasingly dependent on lawyer skill as opposed to the force of policy arguments in favor of the value of an unfettered press to society. Meanwhile, newspaper defendants in Butler's serial libel cases also faced greater challenges at the trial level than they had in earlier cases, in terms of their likelihood to be subject to large punitive or exemplary damages awarded by juries. These challenges reflected the power that a prominent public figure plaintiff such as Butler could wield, which the U.S. Supreme Court would eventually seek to counterbalance with the constitutional libel standards for public officials and public figures erected in *New York Times v. Sullivan* and its progeny.

VI.

Conclusion

The turn of the twentieth century was a period of dynamic change in the relationship between the press and the public in America, and technology played a pivotal role in that change. The unprecedented string of serial libel lawsuits that unfolded between 1890 and 1910 offer a clear view of the ways technology and law intertwined to influence an evolving social conceptualization of acceptable forms and practices of journalism in that formative period. The serial libel cases that played out in trial courts, appellate courts, and the court of public opinion over the turn of the twentieth century offer a rich and complex view of evolving social thought about the interrelationship between journalism and technology in a democratic society. As a subject of historical study, the cases can be seen as both illustrative and instrumental. That is, they resulted from and reflected changing and clashing values related to the social role of journalism at the turn of the twentieth century, but they also influenced the formulation of new ways of thinking about that role that would carry over into the following century. The serial libel cases helped connect technology to the idea that the modern industrialized press required special legal protection in order to serve the public properly, a powerful and lasting conception of the press. This chapter reviews and synthesizes the central findings of the serial libel case studies presented in the preceding chapters, reflects on the broader scholarly implications of the conceptual frameworks used here, and proposes some opportunities to extend the historical findings and arguments toward future study.

The serial libel cases arose at a critical juncture in the professional evolution of journalism in American society. Over the course of the late nineteenth century, the industrialization of urban daily newspapers created greater technical and organizational complexity in the industry while sensationalism and scandal were increasingly utilized as effective and popular strategies to lure readers and sell advertising. Concern about whether the changes in journalism would debase or disrupt a tranquil domestic sphere led to a debate both inside and outside the news industry about privacy, propriety, and reputation. Unease about the social role of journalism, its professional standards, and its effects on privacy and reputation accompanied rising social and geographic mobility and declining confidence in the ability to control or understand life in an interconnected, interdependent, and urban industrial late-nineteenth-century America. The false and defamatory "bad" news that prompted the serial libel suits can be attributed to a competitive atmosphere of increasing sensationalism and mistake-prone speed and complexity in daily journalism. In filing the suits, Smith, Rutherford, Palmer, De Freitas, and Butler confronted the expanding speed, scale, and scope of journalism, and particularly the telegraph's central role in syndicating wire service news that was both "good" and "bad," with commensurately large and widespread legal actions.

Judges hearing libel cases throughout the nineteenth century traditionally considered their most important priority to be the protection of "individual character" from the bad tendency of false information to harm reputations and pollute discourse in

the public sphere.[369] Under the traditional analysis, evidence of a lack of fault or malice by a publisher could not fundamentally undercut a libel suit; it was relevant only insofar as it could mitigate the punitive or exemplary damage award a jury imposed. The publisher bore the responsibility for limiting the potential for such harm, regardless of the source of the libelous statement or her intent in publishing it. The basic standards with regard to liability and republication were often summed up in simple doctrinal aphorisms: "whatever a man publishes he publishes at his peril" and "tale-bearers are as bad as tale-makers."[370]

The serial cases raised new challenges for the traditional libel analysis, as journalistic values of speed, scale, accuracy, and sensationalism converged in conflict with the social values of reputation and propriety. Discourse surrounding the serial libel cases in courtrooms and in the court of public opinion focused on a debate about whether new legal rules should be fashioned to protect newspapers' use of the telegraph as part of their vital role as information disseminators in the public sphere. Many of the defendant newspapers sued by Smith, Rutherford, Palmer, De Freitas, and Butler asserted the need for a wire service defense: a claim that a newspaper's use of a normally trustworthy wire service in publishing the defamatory report should limit its financial responsibility to the plaintiff. Newspapers also argued that evidence of other suits filed by the plaintiff for the same alleged libel should be made available to the jury in the form of a libel syndicate

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[369] Dole v. Lyon, 10 Johns. 447, at 450 (N.Y. Sup. Ct. 1813). Chancellor Kent explained, in a frequently cited phrase on the basic purpose of libel law, that "individual character must be protected, or social happiness and domestic peace are destroyed." See footnote 198 and accompanying discussion in Chapter II.

[370] See Peck v. Tribune Co., 214 U.S. 185, 189 (1909); Newell, *The Law of Defamation*, 253.

defense, which would result in a more informed and fair damage award in consideration of the plaintiff's other lawsuits.

The wire service and libel syndicate defenses were specific strategies reflecting a broader reconceptualization of the doctrine of libel law that the press claimed would acknowledge the special role the modern daily newspaper served in democratic society in disseminating information quickly and efficiently. The press argued that accidentally inaccurate reports should not be treated the same as intentional or malicious lies, particularly when a prompt correction, retraction, or apology was made; that republication or repetition of a libel should not be treated the same as the original publication when so many newspapers relied on the wires for so much of their news; and that, overall, judicial standards should incorporate the informational function of the modern public press in balancing the relative rights and responsibilities of libel defendants and plaintiffs.

Overall, the press rarely convinced judges to limit defendant newspapers' responsibility to plaintiffs based on a rationale that favored the public need for news over the rights of individuals to maintain an unsullied reputation. Judges were also generally unwilling to curtail the relatively free rein of juries to punish publishers they considered to have overstepped the bounds of decency. The bad tendency test for "bad" news prevailed across 28 appellate decisions in serial libel cases between 1891 and 1907; courts rarely allowed special defenses for newspapers based on their unintentional or unknowing republication of wire service material or the appearance that they were the

target of a sweeping and strategic set of libel suits.[371] The appellate court record alone could give the incorrect impression that the serial libel cases imposed a tremendous burden on the newspaper industry. However, although newspapers lost the majority of the serial libel suits at the trial and appellate level, the implications for individual defendants and the press as a whole were not disastrous. Newspaper publishers complained loudly about a rise in libel cases and their onerous cost, but few, if any, were pressured to fold or even alter their professional practices in response to them.

Through the Palmer and De Freitas cases of the late 1890s, journalists faced a growing body of case law that rejected the wire service and libel syndicate defenses but also growing evidence that serial libel plaintiffs like Palmer could be thwarted when newspapers fought libel suits rather than settling them, relying on the likelihood that sympathetic local juries would favor the hometown newspaper over an unknown interloper. The Butler cases, however, offered the opposite lesson, as the celebrity persona of Annie Oakley drove both the widespread publication of the original false story as well as the famous performer's success in the courtroom as a witness in her subsequent libel cases. In fact, juries in New Orleans and Cincinnati were sympathetic enough to

[371] See the discussion of the appellate court rulings in the serial libel cases in chapters III, IV, and V. The notable exceptions are Smith v. Chicago Herald, *Chicago Legal News*, vol. 26, no. 40, June 2, 1894, in which Judge Dunne reversed the trial court's award, arguing "it is absolutely impossible for this modern engine of information to do the work which the times and the people expect and demand, and at the same time verify every item and explore for possible falsity in what seems true;" and Butler v. Gazette Co., 119 A.D. 767 (N.Y. App. Div. 1907), in which Judge Chester denied Butler's argument that the Elmira, New York *Daily Gazette and Free Press* was improperly allowed to present both a libel syndicate a wire service defense at trial.

Butler's case that they awarded her damage amounts that the presiding trial judges later determined were too large.[372]

By the time Butler launched her suits against more than 50 newspapers in the early 1900s, newspaper defendants rarely asserted a wire service or libel syndicate defense in court, having found that they had failed to garner reliable judicial support. At the same time, however, juries' tendencies to favor Butler in their damage awards undermined the strategy of fighting the suits rather than settling them. Instead, journalists and their trade groups used the notoriety of the Butler cases to lobby for legislative reforms at the state and federal level that would limit the impact and likelihood of future serial libel suits. The laws would require plaintiffs to consolidate libel suits for the republication of the same allegedly defamatory story, and require juries to divide a single damage award for the whole of the plaintiff's loss among the defendants, either equally or commensurate to each newspaper's relative culpability. Lobbying efforts served the pragmatic purpose of limiting libel syndicates and protecting the use of wire service news. However, they also reflected the broader values encompassing the wire service and libel syndicate defenses in extending special protection to the press' sometimes-fallible social role of disseminating information quickly and efficiently.

The serial libel cases' most immediate significance resided in the social discourse that enveloped them as they were litigated, wherein judicial and journalistic actors and institutions engaged in a robust debate about the appropriate role of journalism in the

[372] According to Stotesbury, "The Famous 'Annie Oakley' Libel Suits," 584, the trial judge in Butler's case against the New Orleans *Times-Democrat* reduced the jury's award from $7,500 to $5,000. In the suit against the Cincinnati *Post*, the verdict was from $9,000 to $2,500. See also table three in the appendix.

public sphere and the proper place of technology in that role. The cases prompted a meaningful social reconsideration of the democratic role of the press and its rights and responsibilities amid a moment of acute tension among evolving ideas about press freedom, reputation, and privacy. The cases did not result in a sudden or sweeping doctrinal shift toward recognition of the wire service or libel syndicate defense in the courts, although the legislative support that emerged amid the Butler cases eventually grew into more widely accepted rules by the middle of the twentieth century.[373] However, in formulating defenses against the serial libel cases that justified the journalistic need for wire services in spite of their risk of disseminating "bad" news, journalists established a key link between technology and their developing professional identity: an argument that the telegraph was vital to the speedy and efficient dissemination of news that the legal concept of freedom of the press was ultimately intended to protect.

The key historical argument in this study, and its contribution to our understanding of the legal history of American journalism, is that the serial libel cases led the institutional press to link its social role and professional identity to the wire service technology it employed in disseminating information to the public, a link which helped solidify a conception of the institutional press as an authoritative force in articulating the boundaries of discussion in the public sphere. Previous scholarship focused on nineteenth

[373] See discussion at footnote 46. The wire service defense began to gain judicial recognition at the state level beginning the 1930s. See Youm, "The 'Wire Service' Libel Defense," 683. Most states have adopted a version of the National Conference of Commissioners' Uniform Single Publication Act, created in 1952 and published in *Restatement 2d of Torts*, "Single and Multiple Publications" (Philadelphia: American Law Institute, 1977), § 577A. The single publication rule limits plaintiffs to one damage award for a single libelous article, regardless of how often it is republished elsewhere.

century libel law has shown that the press and its advocates articulated a professional identity as the public's "watchdog" that required special privileges in law which clashed with the traditional legal notion that the central purpose of libel law was to protect the sanctity of the *status quo* in politics and polite society.[374] Other studies have linked the emergence of a journalistic professional identity in the late nineteenth century to assertions of a privilege for refusing to reveal confidential sources of information to courts or legislatures, exploring the tension created by journalists' claims that their professional status should allow them to "defy the law."[375] The particular contribution this study makes to our burgeoning understanding of the historical link between journalistic professional identity and special legal privilege for the institutional press is in showing how journalists incorporated technology into the evolving conception of the institutional press and its role in democratic society. The serial libel cases demonstrate, as did journalists' other confrontations with courts over libel and the refusal to reveal confidential sources in the nineteenth century, that conceptual challenges and social tensions emerged from attempts to create or maintain special legal status for the press as an institution, as courts were often unwilling to expand the rights of the press if it meant limiting the rights of other parties or the authorities of other institutions.

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[374] See Gleason, *The Watchdog Concept*, Rosenberg, *Protecting the Best Men*, and Friedman, *Guarding Life's Dark Secrets*.

[375] Spellman, "Defying the Law in the Nineteenth Century," 3; see also Smith, *A Theory of Shield Laws*; Kaminski, "Congress, Correspondents and Confidentiality in the 19th Century;" Gregg, "The First Amendment in the Nineteenth Century;" Gordon, "The 1896 Maryland Shield Law;" and Allen, "Professionalization and the Narrative of Shield Laws."

Beyond its contribution to the historical literature of nineteenth century media law and press freedom, this study offers a unique and important interpretation of conceptual frameworks drawn from the cultural history of journalism and critical legal history. In assessing the serial libel cases as both a product of and contributor to social change, the study that considers both journalism and law to be socially contingent as well as socially constitutive. The frameworks of the cultural history of journalism and critical legal history encourage a broad examination of the discourse surrounding the serial libel cases—both inside and outside the courtroom—in order to understand contested and shifting paradigms of thought about how journalism should be defined and how it should be practiced. The study rests on a theoretical foundation that combines James Carey's "idea of a report," which provides a view of the cases as part of an ongoing social negotiation of acceptable journalistic forms and practices for conveying an "interpretation of reality" to the public, and Robert Gordon's view of law and legal discourse as reflective of competing "paradigm structures of thought designed to mediate contradictions."[376] Law and legal thought play powerful roles in the social process of defining journalism. Contradicting and competing notions of acceptable journalistic forms and practices are mediated through lawsuits, legislation, and government regulations that can carry significant and concrete consequences for individuals and institutions.

[376] Carey, "The Problem of Journalism History," 5, 27; Gordon, "Critical Legal Histories," *Stanford Law Review* vol. 36 (1984): 116. The introduction provides a fuller discussion of these theories and how they are employed in the study.

Moreover, the study views technology, in the form of the electric telegraph, as an important lynchpin in the matrix of law, communication, and the public sphere, a factor that was both essential to their arising in the first place and crucial to the competing ideas of acceptable journalistic forms and practices that developed through their litigation. A proper understanding of the role of the telegraph in the serial libel cases acknowledges that journalists linked the power of that technological tool—its speed and efficiency in disseminating information—to their articulation of the special democratic duty of the press to disseminate a vast range of information to the public as quickly and as widely as possible. Their legal arguments articulated the need for wider latitude to accept the possibility that harmful errors might occur in the news dissemination process, which was a preferable and more democratically acceptable alternative to chilling newspapers' use of the technology in the interest of protecting the reputations of a few individuals. Although telegraph wires had been integral to the business of daily news for decades, the serial libel cases at the turn of the twentieth century were a key moment of "drama" in which journalists, jurors, judges, and libel plaintiffs negotiated the limits of the press' authority and power as a source of knowledge in the public sphere.[377]

The concept of the public sphere itself was also critical to the legal debate over the use of telegraphic technology, as the telegraph helped expand its scale in the late nineteenth century at the same time that commercialization in journalism expanded its

[377] Marvin, *When Old Technologies Were New*, 5. See footnote 43 and accompanying text for a discussion of the use of Carolyn Marvin's work in this study.

scope.[378] The distinction between public and private realms of life was contested in late nineteenth century debates about the social role of the press.[379] At the heart of the serial libel cases were concerns that competitive zeal fed scandal and sensationalism in the news. Separate from the pivotal legal question of the stories' truth or falsity, public perceptions about the propriety of reporting on the alleged love affairs of socialites, illegal schemes of unknown businessmen, or drug addled foibles of celebrities influenced juries' assessments of damages and judges' considerations of whether those damages were excessive, heavily influencing discourse inside and outside of the courts surrounding the formulation of the idea of a report.

In addition to illuminating the specific ways in which the institutional press linked a legal argument about newspapers' social role and professional identity to wire service technology, this study shows the integral role legal thought played in the broader social process of formulating the idea of an acceptable journalistic report and in negotiating the limits of the concept of press freedom. Law played a vital role in mediating contradicting ideas about the forms and professional practices that constitute an adequate and socially acceptable journalistic report, including the values and perils of increasing speed and scale in journalism, and the subsequent conflict associated with the borders of public and private life.

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[378] See footnotes 40 and 41 and accompanying text for a discussion of the use of Jürgen Habermas' work in this study.

[379] Glenn Wallach argues that although the theoretical formulation of the concept of the public sphere was not introduced until the twentieth century by Habermas, the concept was deeply relevant to the late nineteenth century debate over the social role of the press in Wallach, "A Depraved Taste," 33.

Ultimately, bringing legal perspectives into the discussion of the cultural history of journalism can expand our understanding of journalism history by drawing important processes of social negotiation and definition into the picture. The broad topic of the evolving idea of a report has drawn sustained interest and debate among journalism historians, but few studies have incorporated law or legal thinking in a meaningful way.[380] This study shows how both the cultural history of journalism and the legal history of journalism will benefit from a strong bridge between the two disciplines. At its most ambitious level, this study aims to demonstrate how a conceptual framework that blends intellectual, social, and cultural historical approaches while taking seriously the aims of critical legal studies can lead to a more comprehensive view of the development of journalism as a reflection of social consciousness.

Any historical study that claims to contribute new and important historical knowledge, and particularly one that challenges its field to consider broader conceptual perspectives, should direct interested scholars toward the trees most likely to bear fruit. A clearer understanding of the role of technology in the press' claims to special social and legal status and an interest in drawing on conceptual frameworks that acknowledge the

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[380] See Nerone, "Does Journalism History Matter?" 12-13, for a discussion of the rise of the idea of a report as a subject of study in the cultural history of journalism. An excellent recent example is Kathy Roberts Forde and Katherine A. Foss, "'The Facts—The Color!—The Facts' The Idea of a Report in American Print Culture, 1885-1910" *Book History* vol. 15 (2012). Of the legal historical scholarship most relevant to the present study, David Rabban and Norman Rosenberg are broadly concerned with intellectual history related to freedom of speech and are not focused on the press or journalism *per se*. See Rabban, *Free Speech in its Forgotten Years* and Rosenberg, *Protecting the Best Men*. Timothy Gleason uses the press as a central focus of study, but draws mostly on primary legal materials as sources of ideas about press freedom and is less concerned with the broader role of the professional practices and standards of journalism. See Gleason, *The Watchdog Concept*.

role of legal thinking in the social conceptualization of journalism could point an interested scholar in numerous directions. However, several opportunities for expanding on the findings here and subjecting them to further study stand out in particular.

The conceptual framework proposed here could offer an even richer and more complicated explanation for the rise of the serial libel cases and their significance for American journalism, through a deeper and broader consideration of the legal discourse surrounding the cases, the roots of the conflict, and the arguments formulated to resolve it. An expanded study could dig deeper into the background of the influential contributors to these legal debates to explore the roots and motives of their legal thinking, for example. A study that included more trial court records would offer a clearer view of the legal arguments plaintiffs and defendants articulated in their cases than those offered here through the filter of appellate opinions or trial reports in newspapers. Meanwhile, a broader look at the cultural historical milieu of the cases would offer clearer context by incorporating the general views of Americans toward the value of reputation, for example, or the overall prevalence of "bad" news published by newspapers at the turn of the twentieth century. An expanded study could also explore the out-of-court settlements newspapers reached with serial libel plaintiffs as a means of alternative mediation of the conflicting views of the value of freedom of the press and reputation amid what Lawrence Friedman has called "the culture of non-compensation."[381]

[381] Lawrence Friedman and Thomas Russell, "More Civil Wrongs: Personal Injury Litigation, 1901-1910" *The American Journal of Legal History* vol. 34, no. 3 (1990): 295-314, 295.

A closer consideration of trial court records could also expand on the role juries played in drawing boundaries between acceptable and unacceptable publications of syndicated wire service news, articulated through damage amounts they awarded to the serial libel plaintiffs. Juries do not publish legal opinions explaining their decisions, so any jury's rationale for a particular award can be difficult to determine, even with a full case record. Nevertheless, it would be interesting to explore through a larger set of cases and a more complete set of trial records the extent to which juries' verdicts reflected public perceptions about the limits of appropriate news content for the public sphere, and whether news content changed over time to reflect those trends. For example, it seems apparent that the Smith and Butler cases were partly driven by social conceptions about gender roles in turn-of-the century American society.[382] A broader study could consider whether women more generally tended to win larger verdicts against the press for false claims of unchastity or lack of virtue, and whether those verdicts affected news content in particular jurisdictions or even nationwide. If libel verdicts showed consistency in one capacity or another, could it have affected the news values that newspapers demonstrated over time? Did smaller verdicts represent any larger insight into public perceptions of how offensive people considered a particular type of news content to be?

This study's argument that the serial libel cases acted to bolster the belief that the institutional press required special legal status to preserve its special social role is built on scholarship that found the same important conceptual connection in the nineteenth

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[382] See Borden, *Beyond Courtroom Victories: An Empirical and Historical Analysis of Women and the Law of Defamation*, Ph. D. Thesis, University of Washington, 1993 and the discussion of gender roles in the nineteenth century at footnote 48 and accompanying text.

century. The idea that the institutional press' special social role translates into special legal status should be followed into the twentieth and twenty-first centuries, with particular attention paid to the way new communication technologies have caused it to be reconsidered, renegotiated, and revised. In recent years, for example, the Internet has enabled many individuals to gather and publish information at a speed and scale formerly only possible through the resources of a large news media institution. This shift has led some to argue that "we're all journalists now" and that special legal status for the institutional press no longer makes sense in a democratic society.[383] The ongoing debate about whether legal protections for journalism should be defined by institution or function would benefit from a clear understanding of the legal historical development of the relationship between technology and journalism.

The Internet has also complicated legal thinking around libel, and a historical understanding that acknowledges the interrelationship of technology with evolving ideas about reputation and the public sphere could provide much needed insight to ongoing debates. In 1996, Congress passed the Communications Decency Act, a law intended to limit the availability of pornography online. The U.S. Supreme Court struck down much of the law as an unconstitutional abridgement of free speech in the landmark case *Reno v. American Civil Liberties Union*,[384] but left in place the "good Samaritan provision," § 230, which limits civil liability of "interactive computer service providers" for content

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[383] Scott Gant, *We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age* (New York: Simon and Schuster, 2007); see also Dan Gillmor, *We the Media: Grassroots Media by the People, For the People* (Sebastopol, Calif: O'Reilly Media, 2006) and Clay Shirky, *Here Comes Everybody: The Power of Organizing without Organizations* (London: Penguin, 2008).
[384] 521 U.S. 844 (1997).

posted by third party users.[385] The provision was intended to encourage freewheeling speech on the Internet without virtually requiring that websites police the actions of millions of users on the threat of their being held liable for the users' tortious speech. In the following decade, courts interpreted the law as a strong shield for website owners and operators from libel suits based on the postings of users. Legal scholar David Ardia has observed that in doing so, § 230 "upended a set of principles enshrined in common law doctrines that had developed over decades, if not centuries."[386] Critics of the law have argued that it should be curtailed, as it has "fed an untruthful and irresponsible environment for online dialogue" because neither posters or website operators is required "to substantiate the truth of what they say, or take responsibility for the harm caused by any falsehoods they spread."[387] In 2010, soon-to-be Supreme Court Justice Elena Kagan observed in her nomination hearing that legal standards that benefit publishers, such as § 230 or the "actual malice" standard for public officials and public figures derived from the *Sullivan* doctrine might be ripe for reconsideration in the digital age. "When something goes around the Internet and everybody believes something false about a

[385] Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1). In relevant part, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."
[386] David Ardia, "Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act," *Loyola of Los Angeles Law Review* vol. 43, no.2 (2010): 373-506, 411.
[387] Jeffrey Blevins, "OPINION: Court decision cautions us to care for the truth," Cincinnati.com, Aug. 3, 2013.

person, that's a real harm," Kagan said. "And the legal system should not pretend that it's not."[388]

Meanwhile, the serial libel cases could offer even more direct insight to an ongoing debate related to press standards, privacy, and libel in the United Kingdom, where legal standards more closely resemble pre-*Sullivan* American doctrine thanks to the absence of constitutional protection for free speech or press. Tabloid scandals related to the "hacking" of voicemail accounts prompted an official inquiry and official call for more stringent press regulations in 2012.[389] In April 2013, the House of Lords passed a libel reform law aimed at strengthening protection of free speech and limiting so-called libel tourism—cases in which non-British citizens sued non-British defendants for material published in Britain, even online, taking advantage of plaintiff-friendly standards.[390] In substantive ways, the ongoing British debate at the intersection of new technology, libel law, and journalistic standards reflects America's debate at the turn of the last century.

As contemporary journalism contends with the complex and confounding influence of new technology and a heightened state of uncertainty about professional identity, it is important to consider the lessons offered by a similar period of dynamic change just over one hundred years in the past. Given the tendency of legal thought and institutions to respond to and incorporate such changes gradually and unevenly, even as

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[388] Jess Bravin, "Amid All the Talk, a Willingness to Curb Some Speech," *Wall Street Journal*, July 1, 2010, p. A4.
[389] Holly Miller, "Leveson Inquiry Report Calls for New System of Press Regulation in United Kingdom" *Silha Bulletin*, vol. 18, no. 1 (2012): 1-5.
[390] Sarah Lyall, "Libel Cases Now Harder to Bring in England" *New York Times*, April 25, 2013, p. A4.

the times seem to demand immediate reaction, it may be another century before the legal significance of present-day journalistic upheaval begins to become clear. After all, the serial libel cases did not arise until nearly 50 years after newspapers first organized the first wire service, and widespread recognition of the wire service and libel syndicate defenses would not occur for another 30 to 50 years. Now, at the cusp of yet another moment of change at the intersection of journalism, technology, and law, we can expect to see new definitions of "good" news and "bad" news arise amid a debate about the appropriate scale and scope of the journalistic networks in democratic society.

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Appendix

Table One: Appellate Opinions; in roughly chronological order by date of first appellate opinion. In some cases, amount sued for or amount awarded was not reported in an appellate opinion or in news or trade press coverage.

Plaintiff	Defendant (Newspaper)	State; Appellate Jurisdiction	Amount Sued for (if known)	Jury's Verdict	Amount Awarded (if known)	Appellate Opinion Citations	Appellate outcome
Rutherford	Morning Journal Assoc. (New York *Morning Journal*)	New York; 2nd U.S. Cir.		For plaintiff		Rutherford v. Morning Journal Asso., 47 F. 487 (C.C.D.N.Y. 1891); Morning Journal Asso. v. Rutherford, 51 F. 513 (2d Cir. N.Y. 1892)	Morning Journal's motion to set aside "excessive" verdict was rejected
Smith	Sun Publishing Co. (New York *Sun*)	New York; 2nd U.S. Cir.		For Plaintiff	$7,500	Smith v. Sun Pub. Co., 50 F. 399 (C.C.D.N.Y. 1892); Smith v. Sun Printing & Pub. Asso., 55 F. 240 (2d Cir. N.Y. 1893)	Sun's motion for a new trial asserting various errors by trial court was rejected

Table One continued

Plaintiff	**Defendant (Newspaper)**	**State; Appellate Jurisdiction**	**Amount Sued for (if known)**	**Jury's Verdict**	**Amount Awarded (if known)**	**Appellate Opinion Citations**	**Appellate outcome**
Smith	J.N. Matthews (Buffalo *Morning Express* and *Illustrated Express*)	New York; State		For Plaintiff	$4,000	Smith v. Matthews, 6 Misc. 162, 27 N.Y.S. 120, 1893 (N.Y. Super. Ct. 1893); Smith v. Matthews, 9 Misc. 427, 29 N.Y.S. 1058 (N.Y. Super. Ct. 1894); Smith v. Matthews, 152 N.Y. 152, 46 N.E. 164 (1897)	Matthews' motion for a new trial asserting various errors by trial court was rejected
Smith	Chicago *Herald*	Illinois; State		For Plaintiff	$15,000	Smith v. Chicago Herald, Chicago Legal News, vol. 26, no. 40, p. 317-318, June 2, 1894; Albany Law Journal, vol. 50, p. 23, July 7, 1894	Herald's motion to set aside "excessive" verdict was granted

Table One continued

Plaintiff	Defendant (Newspaper)	State; Appellate Jurisdiction	Amount Sued for (if known)	Jury's Verdict	Amount Awarded (if known)	Appellate Opinion Citations	Appellate outcome
Palmer	E.P. Bailey & Co. (Utica *Observer*)	New York; State	$25,000	For Plaintiff	$25	Palmer v. E. P. Bailey & Co., 12 A.D. 6 (Sup. Ct. N.Y. App. Div. 1896); Palmer v. E. P. Bailey & Co., 21 A.D. 630 (N.Y. App. Div. 1897); Palmer v. E. P. Bailey & Co., 33 A.D. 642 (N.Y. App. Div. 1898)	Palmer's motion for a new trial, based on admission of evidence of his "pecuniary standing," was granted
Palmer	New York News Publishing Co. (New York *Daily News*)	New York; State	$25,000	For Plaintiff	$7,500	Palmer v. New York News Pub. Co., 31 A.D. 210 (N.Y. App. Div. 1898); Palmer v. New York News Pub. Co., 158 N.Y. 664 (N.Y. 1899)	New York News' motion for a new trial, seeking to assert "wire service" defense and "libel syndicate" defense, is rejected

Table One continued

Plaintiff	Defendant (Newspaper)	State; Appellate Jurisdiction	Amount Sued for (if known)	Jury's Verdict	Amount Awarded (if known)	Appellate Opinion Citations	Appellate outcome
Palmer	The Leader Publishing Co. (Pittsburgh *Leader*)	Pennsylvania; State	$50,000	For Plaintiff	6.25 cents	Palmer v. The Leader Publishing Company 7 Pa. Super. 594 (Super. Ct. Penn. 1898)	Palmer's motion for a new trial, arguing that nominal damages were insufficient, was rejected
Palmer	J.N. Matthews (Buffalo *Express*)	New York; State		For Plaintiff	6 cents	Palmer v. Matthews, 29 A.D. 149 (N.Y. App. Div. 1898); Palmer v. Matthews, 162 N.Y. 100 (N.Y. 1900)	Palmer's motion for a new trial, arguing the admission of a "wire service" defense and "libel syndicate" defense were in error, was granted
Butler	Barrett & Jordan (Scranton *Truth*)	Pennsylvania; U.S. Cent. Dist. Penn.	$10,000	For Plaintiff	$900	Butler v. Barret & Jordan, 130 F. 944 (C.C.D. Pa. 1904)	Barret & Jordan's motion for a new trial, asserting various errors related to the admission evidence in mitigation of damages, including confusion about the identity of the subject of the story and "wire service" defense, was rejected

Table One continued

Plaintiff	Defendant (Newspaper)	State; Appellate Jurisdiction	Amount Sued for (if known)	Jury's Verdict	Amount Awarded (if known)	Appellate Opinion Citations	Appellate outcome
Butler	Carter and Russell Publishing Co. (Jacksonville *Metropolis*)	Florida; 5th U.S. Cir.		For Plaintiff		Butler v. Carter & Russell Pub. Co., 135 F. 69 (5th Cir. Fla. 1905)	Carter and Russell's argument that Butler failed to show the libelous statements identified her was rejected
Butler	Times-Democrat Publishing Co. (New Orleans *Times Democrat*)	Louisiana; 5th U.S. Cir.	$25,000	For Plaintiff	$7,500 by jury, reduced to $5,000 on appeal	Times-Democrat Pub. Co. v. Mozee, 136 F. 761 (5th Cir. La. 1905)	Times-Democrat's argument that Louisiana law prohibited Butler to recover damages for "shame, disgrace, and mental suffering" was rejected
Butler	Post Publishing Co. (Cincinnati *Post*)	Ohio; 6th U.S. Cir.	$25,000	For Plaintiff	$9,000 by jury, reduced to $2,500 on appeal	Post Pub. Co. v. Butler, 137 F. 723 (6th Cir. Ohio 1905)	Post's argument that Ohio's retraction statute should undercut Butler's suit was rejected
Butler	News-Leader Co. (Richmond *News-Leader*)	Virginia; State	$5,000	For Defendant		Butler v. News-Leader Co., 104 Va. 1 (Va. 1905)	Butler's argument that the trial court's finding that the libel did not identify her was an error was rejected

Table One continued

Plaintiff	Defendant (Newspaper)	State; Appellate Jurisdiction	Amount Sued for (if known)	Jury's Verdict	Amount Awarded (if known)	Appellate Opinion Citations	Appellate outcome
Butler	Hoboken Printing and Publishing Co. (Hoboken *Observer*)	New Jersey; State		For Plaintiff	$3,000	Butler v. Hoboken Printing & Publ'g Co., 73 N.J.L. 45 (Sup. Ct. 1905)	Hoboken Printing & Publishing's argument in favor of admission of a "libel syndicate" defense is rejected, but motion for new trial is granted because Butler failed to establish connection between the libel and loss of earnings and physical distress
Butler	Every Evening Printing Co. (Wilmington *Every Evening*)	Delaware; 3rd U.S. Cir.		For Plaintiff	$3,600	Butler v. Every Evening Printing Co., 140 F. 934 (C.C.D. Del. 1905); Every Evening Printing Co. v. Butler, 144 F. 916 (3d Cir. Del. 1906)	Every Evening's motion for a new trial asserting various errors by trial court, including evidence of mistaken identity, was rejected

Table One continued

Plaintiff	Defendant (Newspaper)	State; Appellate Jurisdiction	Amount Sued for (if known)	Jury's Verdict	Amount Awarded (if known)	Appellate Opinion Citations	Appellate outcome
Butler	Evening Leader Co. (New Haven *Evening Leader*)	Connecticut; 2nd U.S. Cir.	$10,000	For Plaintiff		Butler v. Evening Leader Co., 134 F. 994 (C.C.D. Conn. 1905); Evening Leader Co. v. Butler, 151 F. 1020 (2d Cir. Conn. 1907)	Evening Leader's argument that mistaken identity should constitute a "complete justification" was rejected
Butler	Evening Post Publishing Co. (Charleston *Evening Post* and *News and Courier*)	South Carolina; 4th U.S. Cir.	$10,000 each			Butler v. Evening Post Pub. Co., 148 F. 821 (4th Cir. S.C. 1906)	Butler's motion for a new trial, based on errors in the jury selection process of two consolidated cases, was granted
Butler	Gazette Co. (Elmira *Daily Gazette* and *Free Press*)	New York; State	25,000	For Plaintiff	6 cents	Butler v. Gazette Co., 119 A.D. 767 (N.Y. App. Div. 1907)	Butler's motion for a new trial, asserting trial court errors, including allowing "wire service" and "libel syndicate" defenses, is rejected

Table Two: The *Fourth Estate*'s list of Palmer and De Freitas suits; edited for formatting but otherwise as it appeared in "Those Tyndale Palmer Libel Suits," *Fourth Estate*, July 22, 1897. According to the article that accompanied the list, the information regarding the suits was submitted to the trade paper by newspaper editors and publishers.

	Amount sued for	*Amount of compromise*	*Verdict for*	*Remarks*
Rome (N.Y.) *Sentinel* (Palmer) (De Freitas)	$15,000 10,000		$50.00 .06	
Mansfield (O.) *Shield*	50,000			Case dismissed
Keokuk (Ia.) *Constitution*	50,000			Case dismissed, did not furnish bond
St. Paul *Dispatch*	50,000	$350.00		
Indianapolis *Journal*	50,000			Dismissed; no bond
Indianapolis *News*	50,000			Dismissed; no bond
Indianapolis *Sun*	50,000			Dismissed; no bond
Indianapolis *Amer. Tribune*	50,000			Dismissed; no bond
Pittsburg *Dispatch*	100,000	1,200.00		
Youngstown (O.) *Vindicator*	50,000			Dismissed
Rochester *Post-Express*	20,000		.06	
St. Louis *Post-Dispatch* (Palmer) (De Freitas)	50,000 50,000			Settled out of court; amount not stated.
St. Louis *Republic*	100,000	1,000.00		
Springfield (Mass.) *Union*	10,000			Default; no bond
Syracuse *Herald*	20,000		150.00	
Utica *Observer* (Palmer) (De Freitas) Cases appealed and verdict reduced to $10.	25,000 25,000		10.00	First verdict $25; dismissed; "No cause for action."
N.Y. Daily *News*	25,000		7,500.00	Case appealed.
Milford (Mass.) *Journal* (Palmer) (De Freitas)	10,000 10,000			Dismissed; did not furnish bond.
Lockport (N.Y.) *Journal* (Palmer) (De Freitas)	10,000 10,000	50.00		Each paid own costs.
St. Cloud (Minn.) *Times*	100,000			Case dismissed.

Savannah (Ga.) *Press*	20,000			Not tried yet.
Portland (Me.) *Argus*	20,000			Dismissed; no bond.
Appleton (Wis.) *Crescent*	100,000			Dismissed; no bond.
St. Paul *Pioneer Press* (De Freitas) (Palmer)	50,000 50,000		50.00	Dismissed; new trial asked and denied.
Winona (Minn.) *Republican*	100,000			Case dismissed.
Waterloo (Ia.) *Courier*	20,000			Plaintiffs lost suit.
Cedar Rapids (Ia.) *Republican*	100,000			Case lost.
Oil City (Pa.) *Blizzard*	10,000			No trial.
Huntington (Ind.) *Democrat*	100,000			Dismissed; no bond.
Duluth (Min.) *Evening Herald*	30,000			Never tried.
Brooklyn *Eagle*	25,000	1,500.00		
Boston *Herald*	100,000	500.00		
Canton (O.) *Repository*	50,000		1.50	
Cleveland *World*	50,000	500.00		
Cortland *Standard*	25,000		50.00	Each paid own costs:
Des Moines (Ia.) *News*	100,000			Dismissed; no bond.
Fort Dodge (Ia.) *Chronicle*	50,000		25.00	Def't paid cost.
Hornellsville (N.Y) *Tribune*	10,000		58.75	
Lafayette (Ind.) *Journal*	50,000			Settled for costs.
Pittsburg (Pa.) *Leader*	50,000		.06¼	
	$2,100,000	$5,100.00	$7,895.43¼	

Table Three: The *American Printer*'s list of Butler suits, followed by an additional update on the status of some of the cases; edited for formatting but otherwise as it appeared in "the Famous 'Annie Oakley' Libel Suits," *American Printer*, vol. 40, no. 6. August, 1905, p. 533.

PAPER	DAMAGES CLAIMED
New York Daily *News*,	$25,000
Rochester (N.Y.) *Herald*,	25,000
Rochester (N.Y.) *Union and Advertiser*,	25,000
Rochester (N.Y.) *Times*,	25,000
Elmira (N.Y.) *Gazette*,	25,000
Brooklyn (N.Y.) *Standard Union*,	25,000
Dunkirk (N.Y.) *Herald*,	25,000
Boston (Mass.) *Traveler*,	25,000
Boston (Mass.) *Journal*,	25,000
Boston (Mass.) *Advertiser*,	25,000
Boston (Mass.) *Herald*,	25,000
Lowell (Mass.) *Citizen*,	25,000
Bridgeport (Conn.) *Telegram*,	10,000
Pittsburg (Pa.) *Leader*,	25,000
Philadelphia (Pa.) *Press*,	50,000
Scranton (Pa.) *Truth*,	10,000
Trenton (N.J.) *True American,*	25,000
Cincinnati (Ohio) *Enquirer,*	25,000
Cincinnati (Ohio) *Post,*	25,000
Toledo (Ohio) *Times and News Bee*,	75,000
Cleveland (Ohio) *Press*,	10,000
Cleveland (Ohio) *World*,	10,000
Dayton (Ohio) *Journal*,	5,000
Dayton (Ohio) *Press*,	15,000
Dayton (Ohio) *Herald*,	5,000
Chicago (Ill.) *American*,	25,000
Chicago (Ill.) *Examiner*,	25,000
St. Louis (Mo.) *Star*,	20,000
St. Louis (Mo.) *Chronicle*,	10,000
St. Louis (Mo.) *Globe-Democrat*,	20,000
Des Moines (Iowa) *News*,	35,000
Des Moines (Iowa) *Capital*,	35,000
Des Moines (Iowa) *Register Leader*,	35,000
Richmond (Va.) *News Leader*,	5,000
Savannah (Ga.) *Morning News*,	15,000
Augusta (Ga.) *Herald*,	15,000
New Orleans (La.) *Times-Democrat*,	25,000
Charleston (S.C.) *Evening Post*,	10,000
Charleston (S.C.) *News and Courier*,	10,000
Louisville (Ky.) *Evening Post*,	15,200
Washington (D.C.) *Evening Star*,	30,000
Detroit (Mich.) *Tribune*,	10,000
Topeka (Kan.) *Daily State Journal*,	10,000
Publishers' Press,	50,000
Scripps-McRae Press Association,	30,000

New Haven *Leader*,	10,000
Baltimore *American*,	10,000
Baltimore *News*,	10,000
Baltimore *Evening Herald*,	10,000
Baltimore *Sun*,	10,000
Total,	$1,070,000
The following judgments have been entered:	
Rochester (N.Y.) *Times*,	$1,000
Brooklyn (N.Y.) *Standard Union*,	1,500
Scranton (Pa.) *Truth*,	900
Hoboken (N.J.) *Observer*,	3,000
Cincinnati (Ohio) *Enquirer*,	1,800
Cincinnati (Ohio) *Post*,	2,500
New Orleans (La.) *Times-Democrat*,	5,000
Topeka (Kan.) *Daily State Journal*,	1,000
Hoboken *Observer*,	3,000
Total,	$19,700

"A number of other papers against whom no judgments have been recovered have settled with Mrs. Butler, by making substantial payments to her. The four Boston papers paid her $800 each, the three Des Moines (Iowa) papers $750 each, the St. Louis *Globe-Democrat* $1250, the Cleveland *Plain Dealer* $1000 to $1200, the Kansas City *Star* $500 or $600.

These are all the exact facts that we can give at this time in regard to the suits brot [sic], judgments recovered or settlements made, excepting that in the cases of the Rochester *Herald* and Rochester *Times* there were upon the trial disagreements of the jury, and in the case against the Richmond *News-Leader*, there was a verdict for the defendant. In the case of the New Orleans *Times-Democrat*, the verdict was for $7500 and was reduced by the court to $5000. In the case of the Cincinnati *Post*, the verdict was for $9000, which was reduced by the court to $2500 and appealed. The verdicts of $1000 against the Topeka State *Journal* and Pittsburg *Leader* have been paid. In the case of the Hoboken *Observer* an appeal from judgment was taken. In the case against the Cincinnati *Inquirer* [sic], a motion for a new trial was made, but we have not been advised of the result."