Recent High-profile Cases Highlight the Need for Greater Procedural Protections for Freedom of the Press

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This essay is inspired by, and dedicated to, Professor Owen Fiss, for whom I had the pleasure of serving as a teaching assistant in his first-semester Civil Procedure course (many, many years ago). Professor Fiss used that course to proselytize future law professors, litigators, Justices, Senators, Governors, and the like, that oftentimes "procedure determines substance." Professor Fiss offered as "exhibit A" in support of this thesis the Supreme Court's decision in *Eisen v. Carlisle & Jacqueline*—where the Court held that a putative representative of a class action (in which each class member suffered $70 in losses, on average) must bear the cost of providing written notice to all class members, which the sole plaintiff quite obviously could not afford. Moral: procedural rulings can effectively deny substantive relief.

Two recent high-profile First Amendment cases, *Terry Bollea* (a/k/a Hulk Hogan) *v. Gawker Media* and *Beef Products, Inc. v. American Broadcasting Companies, Inc.* (a/k/a the "Pink Slime" case) demonstrate the need for providing greater *procedural* protection to news media (press) defendants in civil litigation arising from their newsgathering and publishing activities. More specifically, it is my thesis that to provide the "breathing space" for the freedom of speech that the First Amendment requires, there *must* be an opportunity for interlocutory (pre-trial) appeal of dispositive motions premised on First Amendment defenses in civil cases challenging arguably protected speech. While others have advocated for such relief in the past, these two recent cases demonstrate that the need for such protection has never been greater.

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Two Major Setbacks for Freedom of the Press

I do not intend to re-argue here the merits (substance) of those two cases. Suffice it to say that I firmly believe that in both cases the media defendants *should* have, and if they had the opportunity to appeal interlocutorily (or even post-judgment), *would* have prevailed. The so-called Hulk Hogan "sex tape" that Gawker publicized was unquestionably a matter of legitimate public interest and concern (as Florida's Court of Appeals had earlier held) at the time Gawker.com posted its commentary on, and excerpts of, the tape. And, as we all know, the Supreme Court has held that lawfully obtained truthful information about "matters of public concern" cannot, absent countervailing interests "of the highest order," give rise to civil damages for claims of "invasion of privacy" or "intentional infliction of emotional distress." Nevertheless, after the trial court judge denied Gawker's motion to dismiss (in which Gawker asked the judge to apply the Court of Appeals' holding that Gawker's report addressed a matter of legitimate public concern), and Gawker sought appellate review of *that* ruling, the Court of Appeals dismissed the appeal for lack of appellate jurisdiction.

So too, the series of reports that ABC News broadcast, in March and April 2012 —alerting the public to the fact that 70 percent of "fresh ground beef" sold in the nation's supermarkets contained a highly processed, pulverized meat product, treated with anhydrous ammonia, which a former USDA microbiologist disparagingly dubbed "Pink Slime"—were comprised of fully protected statements of opinion (from highly credible on-the-record sources), substantially true assertions of fact, and were published without "actual malice." As media lawyer Tom Julin put it "ABC had taken care to clearly describe the beef product and how it was made and never said it was unsafe for human consumption, and [] its statements appeared to be protected under the law as either true, or opinions."

Notwithstanding the substantive merits of those two cases, both produced dramatic victories for the plaintiffs and, consequentially, devastating setbacks for freedom of the press: the *Bollea* case resulted in the bankruptcy and demise of the media outlet Gawker.com. This outcome produced what former *New York Times* Public Editor Margaret Sullivan dubbed "the Gawker effect" of media self-censorship. The settlement of the ABC "Pink Slime" case, which, at greater than $177 million, exceeded any previous defamation verdict that not vacated post-trial in U.S. history, prompted predictions of open floodgates of libel litigation against, and self-censorship by, the American press.

What produced these terrible outcomes? In both cases the presiding trial judge improperly denied the media defendants' dispositive motions (requiring the cases to be tried to a local jury), and there was

no guaranteed path for interlocutory appeal of those rulings. And that, alone, is the point of this essay: to fully protect the "breathing space" the First Amendment affords reporting on matters of legitimate public interest (whether it be a preexisting public controversy over a retired professional wrestler's extramarital relations or the composition of the nation's food supply), the press *must* be provided a "second look" by an appellate court *before* being forced to endure the financially crushing costs of trial and potentially business-ending jury verdicts.

Below, I outline four alternative routes to effect the necessary change—two are legislative, and two are judicial. The failure to provide for such interlocutory appeal of denial of dispositive motions premised on First Amendment defenses, either by statute or judicial creation, imposes an unacceptable burden on the freedom of the press and the freedom of speech.

The Limited Procedural Protections for Media Defendants in Free Speech Cases

Through a series of landmark decisions, starting in 1964, the Supreme Court has provided myriad *substantive* protections for freedom of speech and the press. These First Amendment–based precedents significantly circumscribe civil claims for money damages premised on publications that address matters of public interest and concern. Since *New York Times Co. v. Sullivan*, which first constitutionalized state libel law, up through *Snyder v. Phelps* (the 2011 ruling barring invasion of privacy claims brought by the surviving family members of a fallen soldier), the Court has held that substantially truthful statements, statements of opinion, rhetorical hyperbole, satire, and even highly offensive, "outrageous," and unquestionably injurious speech cannot typically give rise to civil liability unless it fits within a recognized category of unprotected speech. Nor can false and defamatory statements about public officials or public figures be sanctioned absent a finding, by clear and convincing evidence, that the speaker uttered such false statements with knowledge of their falsity or with a "high degree of awareness of [their] probable falsity."

But apart from these constitutionally based *substantive* limitations, the Court has, thus far, imposed only limited *procedural* limitations on speech-based torts. In 1986, the Court held in a defamation case brought by a public official or public figure, when ruling on a motion for summary judgment premised on defendant's lack of actual malice, the trial court is required to determine whether the plaintiff has produced a sufficient quantum of admissible evidence from which a jury could find "clear and convincing" proof of actual malice. In other words, the trial court is required to apply the standard of proof the plaintiff must satisfy at trial to determine whether the plaintiff has defeated a pre-trial dispositive motion and only if the plaintiff has done so may the case proceed to trial. But even this apparent "accommodation" was described as a routine application of the standard for determining the viability of claims subject to heightened burdens of proof and was thus not inconsistent with Court's "general reluctance 'to grant special procedural protections to defendants in libel and defamation actions.'"

The other significant, and indeed more-frequently-than-not dispositive "procedural" protection the Court has extended to libel claims (and others involving the freedom of speech), is the requirement of "independent appellate review." Under this doctrine, when an appellate court reviews a jury's verdict against a defendant—media or otherwise—in a defamation case, the Court departs from its usual practice of giving deference to the jury's determination of "the facts;" instead, because the existence of "actual malice" is considered a "constitutional fact," the reviewing court has "an obligation to make 'an independent examination of the whole record' in order to make sure that 'the judgment [below] does not constitute a forbidden intrusion on the field of free expression.'" But, alas, this tremendously valuable procedural tool only becomes available after a jury has returned its verdict against the press, following months or years of costly discovery and a full trial.

Thus, once a trial court has denied a press defendant's motion for summary judgment, applying the above substantive standard, in the absence of any statutory or other free-standing mechanism for interlocutory (mid-litigation) review, the case proceeds to trial and the defendant must await a "final judgment," following all post-trial motions challenging the verdict, to appeal. Similarly, once a trial court denies a press defendant's initial motion to dismiss a complaint—for example because the plaintiff's claims are premised on nonactionable statements of opinion, or do not reasonably convey the allegedly defamatory implication the plaintiff urges—the press defendant must, absent any applicable statutory mechanism for interlocutory appeal, endure the high cost of discovery and trial prior to obtaining appellate review of the trial court's ruling.

Recognition That Protracted Litigation May Itself Chill Freedom of Speech, Regardless of the Outcome

In *New York Times Co. v. Sullivan*, the Justices specifically acknowledged that news outlets' concern about large civil damage awards could be more inhibiting than potential criminal liability for libel. Three years later, the Court acknowledged that "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, [and] even *fear of the expense involved in their defense*, [will] inevitably cause publishers to 'steer . . . wider of the unlawful zone' . . . and thus 'create the danger that the legitimate utterance will be penalized.'"Other courts have recognized the need for speedy resolution of claims that are premised on a defendant's exercise of fundamental constitutional rights like those of free speech and freedom of the press. For example, the United States Court of Appeals for the District of Columbia Circuit has held that "*The threat of being put to the defense of a lawsuit* . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit . . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." Similarly, the Ninth Circuit Court of Appeals

has held "[b]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. . . . Therefore, defamation actions should be disposed of at the earliest possible stage of the proceedings. . . ."

Numerous state courts have also acknowledged that subjecting media defendants to protracted litigation, including costly discovery and trial, may itself trammel the protections of the First Amendment. For example, the district court for the District of Columbia has

> recognize[d] the primary values in our society reflected in the First Amendment and the significant risk that even a non-meritorious defamation action may stifle open and robust debate on issues of public importance. In this area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and *necessary judicial function*. California's Court of Appeals has similarly held that "[i]n cases involving free speech, a speedy resolution is desirable because protracted litigation may [itself] chill the exercise of First Amendment rights**.**" And New Mexico's Court of Appeals has stated that "the failure to dismiss an unwarranted libel suit might necessitate long and expensive trial proceedings that would have an undue chilling effect on public discourse."

Thus, there is abundant judicial precedent recognizing that the First Amendment compels expeditious resolution of such claims to avoid "chilling" the freedoms of speech "or of the Press."

Different Routes Available to Provide the Needed Procedural Protection

As noted above, under the ordinary rules of civil procedure, and various statutes that demarcate the jurisdiction of appellate courts, media defendants must ordinarily await the final determination, post-trial, of a libel or invasion of privacy lawsuit to obtain appellate review of the trial court's rulings denying dispositive motions. Interlocutory appeals are strongly discouraged, even in jurisdictions that allow for such discretionary appeals.

Statutory Bases for Interlocutory Appeal as of Right

Thankfully, legislatures in some twenty-nine states have established exceptions to those standard operating procedures, in two different forms. First, the state legislatures in Texas and New York have provided a guaranteed interlocutory appeal of denials of certain summary judgment motions.

The second, and far more widepread, legislative route to guarantee interlocutory review of dispositive motion denials is the anti-SLAPP statute. Two University of Denver law professors first coined the term "Strategic Lawsuits Against Public Participation" and advocated for the passage of laws to address and rectify the scourge of suits filed by certain wealthy interests (e.g., real estate developers) against environmental activists and other concerned citizens in retaliation for their voicing opposition to their development projects. The purpose of these "SLAPP" lawsuits is not to "win" them and recover money damages for any actual injuries the plaintiffs had sustained, but to impose the costs and burdens of litigating such claims on the defendants as a means to silence those critics and simultaneously "chill" the speech of others who might contemplate engaging in such public advocacy.

Following the passage of the first anti-SLAPP statutes, in Washington state in 1989, some legislatures and courts expanded the reach of such statutes beyond the purview of political controversies to include protection for defendants' actions "in furtherance of their right of free expression" on matters of legitimate public interest or concern. However, according to The Citizen Participation Project, only twelve states' anti-SLAPP statutes provide protection to press reports on matters of public concern.

The anti-SLAPP statute's several inter-related benefits collectively facilitate speedy and early resolution of libel cases and "weed out" those that lack merit. Though the statutes vary state-by-state, several provide for a "special motion to strike" or other similar procedural mechanism by which the defendant may bring an early summary judgment-style motion. Importantly, the filing of such a motion automatic stays discovery, other than that which is necessary for the plaintiff to respond to the special motion to strike. Furthermore, many of the statutes play a significant role in deterring plaintiffs from filing meritless or frivolous claims, because the statutes provide for a mandatory award of attorneys' fees to a defendant who prevails on a special motion to strike.

In addition to these significant procedural protections, fifteen states' statutes also provide for a right to immediate interlocutory appeal of a trial court's denial of the anti-SLAPP motion. Thus, had either of the *Bollea v. Gawker Media* or the ABC pink slime case been filed in any of the states that have adopted such a statute, both Gawker and ABC would have had the right to appeal the denial of their motions for summary judgment immediately and thereby avoid the financial burdens of trials and perfecting an appeal following an adverse jury verdict. But, alas, neither Florida nor South Dakota, the states in which those cases were adjudicated at the time, provides for an interlocutory appeal as of right.

It is, therefore, imperative that members of the press and their trade associations advocate and lobby aggressively for the adoption of anti-SLAPP statutes in all thirty-seven states that currently lack such legislation and to pursue and support passage of a federal anti-SLAPP Act by the U.S. Congress. The need for federal legislation is particularly great in light of the recent spate of federal court decisions holding that state anti-SLAPP statutes do not apply to diversity actions litigated in federal court.

Judicial Interventions

An alternative route for establishing an automatic right to interlocutory appeal of the denial of a dispositive motion requires judicial intervention,

and innovation.

Because most states' appellate courts' jurisdiction, like that of the federal courts, typically require a final case-terminating judgment as a "final" *appealable* order, trial court judges cannot certify a denial of a dispositive motion for automatic appellate review. However, several states have recognized that denial of a summary judgment motion on grounds of actual malice may subject a defendant to unnecessary and burdensome litigation, which implicates a "substantial [constitutional] right;" such courts have allowed for an interlocutory appeal of such a ruling in those circumstances.

There are two alternative judicial routes to effectuate an "automatic" appeal, before trial, on the merits of a media defendant/public matter libel or invasion of privacy case: (1) by trial court judges erring on the side of caution, and granting defendants' dispositive motions while expressing reservations; and (2) a more fully articulated legal argument for appellate courts to recognize a right of interlocutory appeal in such cases, as rooted in and mandated by the First Amendment. I will discuss each route below.

Discretionary Approaches

Notably, in the ABC pink slime case, South Dakota law provides for a potential interlocutory appeal of a denial of summary judgment, but such appeal is pursued via a petition to South Dakota's Supreme Court which has discretion whether to grant the petition and hear the interlocutory appeal. Indeed, ABC News filed a petition seeking interlocutory review of the trial court's denial of its summary judgment motion, but the South Dakota Supreme Court denied that petition, sending the case to trial. But such "discretionary" options place the onus on the appellate tribunals, which are prudentially required to avoid deciding thorny constitutional questions unnecessarily; thus appellate judges are inclined to deny discretionary interlocutory review, in the hopes that the matter may be fully resolved below (through settlement or a defense verdict).

Accordingly, trial court judges should "err on the side of free speech" and should, in exercising judicial "discretion," presumptively grant dispositive motions in "close cases," with the clear objective of enabling pretrial review by an appellate court. As the basis for this approach, I again credit Professor Fiss, who espoused the view that when balancing competing societal interests, the Supreme Court has recognized that the First Amendment "serves as a thumb on the scales" in favor of freedom of speech. While this "weighted balancing" approach is employed in the *substantive* balancing of interests, it should properly inform the balancing of interests in *procedural* questions, where a "false positive" (case goes to trial, despite substantive infirmity with the claim) has far greater adverse impact on the freedom of speech and the press than a "false negative" (a wrongly granted dispositive motion that is reversed on appeal and the case remanded for trial).

Indeed, such "procedural" exceptions to standard operating procedures have been recognized as justified by the First Amendment interest to avoid "chilling" speech. For example, the Supreme Court has recognized the "overbreadth" exception to the ordinary standing doctrine, allowing those subjected to criminal penalties premised on free speech activities to assert the rights of others, not present before the court, whose speech or expressive conduct could be chilled and thereby infringed by application of the challenged statute. Similarly, the ordinary "vagueness" challenge to criminal statutes is ratcheted up and applied with heightened judicial scrutiny when courts are called upon to assess the constitutionality of laws that criminalize speech and other expressive conduct.

And, when laws or ordinances are shown to impact constitutionally protected conduct, it is the government, not the party who challenges the law, who bears the *burden of proof* to establish that the statute passes constitutional muster (in contrast to the burden of proof on the challenger on most other occasions). This same shifting of the burden of proof has been applied in the area of libel law: a private figure plaintiff suing a member of the media for publishing on a matter of legitimate public concern must prove the falsity of the challenged statements, reversing the common law allocation of burden of proof on the defendant to establish the publication's truth.

Lastly, and perhaps most aptly, in recognition of the fact that the mere pendency of a prosecution for engaging in protected expressive conduct and/or speech—regardless of whether a conviction is likely to result – the courts have created an exception to the ordinary "ripeness" doctrine, authorizing pre-enforcement challenges to such criminal statutes. Indeed, it was in that context that the Supreme Court recognized that "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." So, too, in defamation cases, the Court has recognized, "fear of the expense involved in their defense" may itself produce self-censorship even if there is little or no realistic prospect of judgment being entered against the defendant.

These examples demonstrate that, in a variety of contexts, the Supreme Court has recognized that ordinary *procedural rules* must be suspended or significantly modified to afford appropriate protection to freedom of speech enshrined in the First Amendment. Accordingly, it would be consonant with such precedents for trial court judges to "err on the side of freedom of speech"—to have the "First Amendment act as a thumb on the scales"—by granting motions for summary judgment in close cases, even while they express skepticism or ambivalence in such rulings. Proceeding in this fashion will allow (require) an appellate court immediately to review the entire case file and determine, in *advance* of trial, whether such a trial is necessary.

From the plaintiff's perspective, the only real "cost" to such an approach is that the trial may be delayed for a year or so. But even in that case, the fact that the appellate court has sent the case back for trial is likely to incentivize a defendant to take another look at settlement rather than litigating through trial in the hopes of obtaining a favorable verdict or success on appeal.

The downside of the current practice—denying "close" motions for summary judgment and thereby delaying the defendant's opportunity for appellate review until after a verdict has been returned—is self-evident.

Make New Law

Alternatively (and preferably), appellate courts can establish a right of interlocutory appeal by recognizing such a procedural remedy as compelled by the First Amendment. As demonstrated above, the courts have, in the past, recognized that the mere pendency of protracted litigation against the press, including the often-crushing costs of discovery, trial, posttrial motions and appellate practice, can themselves deny defendants their First Amendment rights. This, combined with the already established constitutional mandate of "independent appellate review," can, I believe, lay the foundation for judicial recognition of another constitutionally-mandated procedural accommodation for The Freedom of Speech or Of the Press: mandatory interlocutory appeal:

In this brief essay, I do not provide a fully developed jurisprudential and precedential basis for such a newly crafted "procedural" remedy. Instead, I strongly encourage my colleagues in the legal academy (and their students) to prepare more thorough and persuasive arguments for appellate courts to adopt such a rule of law.

Independent Appellate Review Frequently Protects the Press

Of course, appellate review is not a panacea or a "silver bullet" that will invariably yield a defense judgment. However, studies conducted by the Media Law Resource Center, dating back to 1980, demonstrate that appellate review is, *far more often than not*, the ultimate salvation for press defendants in libel cases. According to the MLRC's 2016 Report on Trials and Damages, media defendants who opted to appeal jury verdicts in favor of plaintiffs between 1980 and 2015 were successful in having those jury awards vacated or modified on appeal in 63% of the time. In all, a jury verdict in favor of the plaintiff was affirmed in full less than one-third of the time in such cases.

In state courts where state anti-SLAPP statutes provide for a right to interlocutory appeal of denied dispositive motions, media defendants can take advantage of those favorable odds, and may do so, as of right, *before* enduring the devastating financial burden of discovery and trial. One author surveyed the cases decided under New York's statute found that between 1986 and 1994, more than ninety percent of interlocutory appeals of denials of summary judgment resulted in either a full reversal or a partial reversal.

It Is High Time . . .

The two recent high-profile media defendant cases bear out that, as Professor Fiss instructed, the lack of procedural safeguards can have devastating substantive impact: apart from the bankruptcy-causing jury verdict, Gawker Media expended $13 million simply *defending* the Hulk Hogan case, which for Mr. Bollea was financed (from behind the curtains, until exposed post-trial) by internet billionaire Peter Thiel. Securing the $140 million jury verdict in order to perfect the appeal of the jury verdict proved insurmountable for Gawker Media, forcing the company into bankruptcy, and eventually, to shutter the Gawker.com website altogether.

And while the amount ABC paid to *defend* the Pink Slime case has not been disclosed, it is a matter of public record that in the five years of litigation before the trial, involving as many as 48 attorneys entering appearances from both local and top-tier law firms in Chicago and Washington D.C., the parties took over 140 fact depositions, exchanged over a million pages of documents, and retained thirty expert witnesses. The trial was scheduled to last eight full weeks. As NYU's media law and ethics professor Charles Glasser stated, "ABC was hemorrhaging legal costs . . . these news organizations are corporations – they have a fiduciary duty to stockholders." The potential exposure ABC faced, under the South Dakota "food libel" law, was $5.7 billion. Few, if any, media companies could comfortably "carry" such a potential liability on its corporate ledger throughout the months or years of appeal.

The day the ABC Pink Slime settlement was announced, the plaintiff, Beef Products Incorporated issued a press release declaring "We are extraordinarily pleased to have reached a settlement of our lawsuit against ABC and Jim Avila. . . . This agreement provides us with a strong foundation on which to grow the business . . ." Local news reported that

> [t]erms of the settlement are confidential, but judging from the celebratory mood of BPI officials and their lawyers Wednesday morning, one could conclude that terms of the settlement were favorable to the company.

"We are extraordinarily pleased with this settlement," BPI attorney Dan Webb said in a brief statement outside the Union County Courthouse. "I believe we have totally vindicated the product."

Despite ABC News' public statement declaring it stands behind its journalism (and does not retract any portion of its reports) and its continued commitment to reporting on matters of public concern, several commentators voiced concern about the "optics" of the settlement. Jane Kirtley, professor of media ethics and law at the University of Minnesota Law School, said "I think it could be read by many that the news media are prepared to back down if challenged," and she noted that other potential plaintiffs might take this settlement to mean that "even a spurious lawsuit might result in someone getting money." Fox News' Dana Perino declared that BPI had in fact "won" the lawsuit, and that what ABC reported "was actually fake news."

Then, five weeks after the settlement was announced, the news broke that ABC News' corporate parent, The Disney Company, had paid $177 million, and that its insurers paid an undisclosed *additional* amount, to settle the case. This startlingly large figure prompted another round of hand-wringing about the future of libel litigation and its impact

on investigative journalism.

While these two cases most starkly demonstrate the need for an early, pre-trial "second look" from appellate judges, such costly impositions on the press, under the *status quo*, are commonplace. For example, a few years ago in a defamation case against the *Virginian-Pilot* newspaper, the plaintiff, an assistant principal, sued the newspaper and one of its reporters over a news story, which the plaintiff alleged defamed him by *implying* that he had improperly intervened in school disciplinary matters to obtain preferential treatment for his son. The trial court overruled the defendants' demurrer on the issue of defamatory meaning, forcing the case to proceed through extensive discovery and trial that resulted in a $3 million verdict for the plaintiff. Thereafter, the trial court granted the newspaper's motion to strike the jury's verdict on grounds that there was insufficient evidence of actual malice presented at trial.

On appeal, the Virginia Supreme Court not only affirmed the trial court's posttrial dismissal order, it made clear its view that everything that had happened in the case following the trial court's earlier error, in overruling Defendants' demurrer, was a waste of time and resources. So, while the *Virginian-Pilot* ultimately did not pay anything to the plaintiff, it was "on the hook," and "out of pocket" for the tens, if not hundreds, of thousands of dollars in attorneys' fees and the significant interference with its reporters' and editors' job responsibilities, tied up in months of unnecessary litigation. This experience seemed to embody the words of Fourth Circuit Judge J. Harvey Wilkinson:

> Even if liability is defeated down the road, the damage has been done. The defendant in this case may well possess the resources necessary for full protracted litigation, but smaller dailies and weeklies in our circuit most assuredly do not. The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well.

In sum, to subject members of the press to the devastating costs of discovery and trial as the prerequisite for obtaining independent appellate review, "to ensure that the judgment below does not constitute a forbidden intrusion into the sphere of free expression," is to effectively deny that remedy altogether. Almost two decades ago, the legendary media attorney Dick Winfield proclaimed, in these very pages: "Interlocutory Appeal as of Right: *The Time Has Come*." Now that President Trump has announced it's "open season" to sue the press, and his call has been heard, and taken up, by his wife, coal company magnates, Russian oligarchs and the like, the time for this crucial procedural safeguard for Freedom of the Press has most certainly come.

Endnotes

1. *See* R. Cover, O. Fiss & J. Resnick, Procedure (Foundation Press 1988).

2. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

3. *See* Cover, Fiss & Resnick, supra, n.1, at 495–513.

4. I am by no means the first to advocate for special procedural protections for the press in civil litigation. *See, e.g.,* Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment,* 66 TEX. L. REV. 215, 256 (1987); *see also* Susan Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1801 (1998); Cf. Lee Levine, Judge and Jury in the Law of Defamation, 35 AM. U. L. REV. 3 (1985).

5. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

6. *See* infra n. 66 [FINAL FN].

7. *See Gawker Media LLC v. Bollea*, 129 So.3d 1196, 1202 (Fla. Ct. App. 2014) ("the written report and video excerpts are linked to a matter of public concern—Mr. Bollea's extramarital affair and the video evidence of such—as there was [already] ongoing public discussion about the affair and the Sex Tape, including by Mr. Bollea himself."); *see also Bollea v. Gawker Media, LLC*, No. 8:12-CV-02348-T-27, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012) ("prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.")

8. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech . . . on a matter of public concern . . . is entitled to 'special protection' under the First Amendment [and] cannot be restricted simply because it is upsetting or arouses contempt."); *see also Bartniki v. Vopper,* 532 U.S. 514, 534 (2001) ("The right of privacy does not prohibit any publication of matter which is of public or general interest.") (quoting S. Warren and L. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 214 (1980)).

9. *See supra* n. 7.

10. That ABC News did not publish its reports with "actual malice" is well-supported by the evidence: first, ABC News relied on three highly knowledgeable and reputable sources who appeared on camera in those reports. Second, ABC News was aware that several other news and national media outlets had published the exact same information prior to ABC News' reports. *Compare* Jim Avila, *70 Percent of Ground Beef at Supermarkets Contains "Pink Slime,"* ABC News.com (Mar. 7, 2012) (*since removed from the website)* with David Knowles, Partners in "Slime"—Feds keep buying ammonia-treated ground beef for school lunches, THE DAILY, (Mar. 5, 2012), *available at* http://agriculture-defensecoalition.org/sites/default/files/file/geo_current_116/3_2012_Factory_Food_Ground_Beef_in_Schools_May_Contain_Ammonia_Treated_Pink_Slime_March_5_15_2012_Several_Newspaper_Articles_Video.pdf (pp. 16-19); *Pink Slime for School Lunch: Government Buying 7 Million Pounds of Ammonia-Treated Meat for Meals*, HUFFINGTON POST, Mar. 5, 2012, *available at* http://www.huffingtonpost.com/2012/03/05/pink-slime-for-school-lun_n_1322325.html.

11. Daniel Siegal, *ABC Trial Broadcasts Media's Liability in "Fake News" Era*, LAW360, June 28, 2017.

12. *See* Margaret Sullivan, *That R. Kelly "Cult" Story Almost Never Ran. Thank Hulk Hogan for That*, WASH. POST, July 30, 2017.

13. The amount the payment the Pink Slime plaintiff received remains confidential. However, in August 2017, Disney, the

parent company of ABC News, reported to the SEC its payment of $177 million, apart from insurance proceeds, to resolve previously disclosed litigation. *See, e.g.*, Joe Flint, *Disney Discloses Litigation Charge*, DOW JONES NEWSWIRES, Aug. 9, 2017. BPI's counsel confirmed that his clients had received more than $177 million in the settlement. Subsequently, in October 2017, a New Hampshire jury awarded a larger amount in a different defamation case, but at the time this article was submitted, post-trial motions and appeal of that verdict had not been completed. *See* Ryan Boysen, *Jury Awards over $274M in Billboard Defamation Cas*e, Law360 (Sept. 29, 2017), https://www.law360.com/articles/969754/jury-awards-over-274m-in-billboard-defamation-case.

14. *See, e.g.*, Susan Seager, *Why ABC's "Pink Slime" Settlement Is a Red Flag for Free Press*, THE WRAP, June 28, 2017; David Uberti, *Everything about Disney's and ABC's "Pink Slime" Settlement Should Scare the Hell Out of You*, SPLINTER, Aug. 17, 2017.

15. 376 U.S. 254 (1964).

16. *Snyder v. Phelps*, 562 U.S. 443 (2011).

17. *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

18. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

19. *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970).

20. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

21. *See Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here— inflict great pain. [But] we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

22. *Id.*

23. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986). Arguably, too, the imposition of the "clear and convincing evidence" standard at trial, and the imposition on the plaintiff of the burden of proving material falsity, are two additional "procedural" limitations in defamation cases. See infra text accompnaying n. 49.

24. In the aftermath of the Supreme Court's rulings that raised the pleading standard under Federal Rule of Civil Procedure 8 to state a "plausible" claim for relief, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), several lower courts have applied that standard to scrutinize and dismiss complaints against the media for failure adequately to plead actual malice. See, e.g., Schatz v. Republican State Leadership Comm., 669 F.3d 50, 56 (1st Cir. 2012); Biro v. Condé Nast, 807 F.3d 541, 546 (2d Cir. 2015) (citation omitted), cert. denied, 136 S. Ct. 2015 (2016); Mayfield v. NASCAR, 674 F.3d 369, 377-78 (4th Cir. 2012); Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016); see also Reese v. Pook & Pook, LLC, 158 F. Supp. 3d 271, 289 (E.D. Pa. 2016).

25. *Anderson*, 477 U.S. at 256 n.7 (quoting *Calder v. Jones*, 465 U.S. 783, 790–91 (1984)).

26. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–286 (1964)).

27. *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967) (emphasis added) (citing, inter alia, *New York Times Co.*, 376 U.S. at 279).

28. *Washington Post v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1965); *see also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 n.76 (3d Cir. 1980) ("The cost of litigating a libel action, burdensome on even the largest news organizations, often can cripple smaller news operations."); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir. 1980).

29. *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992) (internal quotations and citation omitted).

30. *See, e.g., Welch v. Am. Publ'g Co. of Ky.*, 3 S.W.3d 724, 729 (Ky. 1999) ("Courts should resolve free speech litigation more expeditiously whenever possible. The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom.") (internal quotation and citation omitted); *Mark v. Seattle Times*, 635 P.2d 1081, 1088 (Wash. 1981) ("Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are waived if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.") (citations omitted).

31. *Myers v. Plan Takoma, Inc*., 472 A.2d 44, 50 (D.C. 1983).

32. *Kirby v. Sega of Am., Inc*., 50 Cal. Rptr. 3d 607, 612 (Cal. Ct. App. 2006).

33. *Andrews v. Stallings*, 892 P.2d 611, 616 (N.M. Ct. App. 1995); *see also Barnett v. Denver Pub'g Co*., 36 P.3d 145, 147 (Colo. Ct. App. 2001) ("Because the threat of protracted litigation could have a chilling effect upon constitutionally protected rights of free speech, prompt resolution of defamation actions, by motion for summary judgment or motion to dismiss, is appropriate."); Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N.Y., 475 N.Y.S.2d 383, 387-88 (N.Y. App. Div. 1984) ("[C]ourts should not be oblivious to the crippling financial burden which the defense of libel claims entails, even for major news organizations, and the consequent chilling effect this burden can have on the dissemination of news." (citation omitted)); Phillips v. Wash. Magazine, Inc., 472 A.2d 98, 101 (Md. Ct. Spec. App. 1984) (recognizing that "freedom of speech can be chilled by expensive libel litigation"); Armstrong v. Simon & Schuster, Inc., 625 N.Y.S.2d 477, 480 (N.Y. 1995) (noting that dispositive motions are of "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms").

34. *See, e.g.,* 28 U.S.C. § 1291; *but see* 18 U.S.C. § 1292(b) (allowing for interlocutory appeals in certain limited circumstances by trial court and discretionary granting of appeal by Circuit Court).

35. *See* CPLR §5701[a][2][iv–v]; Texas Civ.Prac. & Rem.Code § 51.014.

36. Public Participation Project, Your State's Free Speech Protection, https://anti-slapp.org/your-states-free-speech-protection/#reference-chart.

37. According to the Public Participation Project, https://anti-slapp.org/your-states-free-speech-protection/#reference-chart, fourteen states so provide: California, D.C., Georgia, Hawaii, Illinois, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Pennsylvania, Texas, Utah, and Vermont. Oregon, too, so provides. *See Schwern v. Plunkett*, 845 F.3d 1241, 1244 (9th Cir. 2017).

38. During the *Bollea v. Gawker Media* litigation, Florida significantly expanded its anti-SLAPP statute to apply against non-governmental plaintiffs, but it did not apply retroactively to pending cases. The revised statute does not provide for automatic interlocutory appeal, in any event.

39. Notably, the American Bar Association in August 2012 voiced its support for passage of a federal anti-SLAPP statute.

See https://www.americanbar.org/groups/communications_law/news_announcements.html.

40. *See, e.g.*, Cory L. Andrews, *Are Anti-"SLAP" Statutes Toothless in Federal Courts?*, FORBES, Feb. 24, 2017; *Compare Abas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333–37 (D.C. Cir. 2015) and *Carbone v. Cable News Network, Inc.*, No. 1:16-CV-1720-ODE (N.D. Ga. Feb. 15, 2017), *available at* http://www.documentcloud.org/documents/3467031-Carbone.html with *Godin v. Schencks*, 629 F.3d 79,81 (1st Cir. 2010), *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 169 (5th Cir. 2009), and *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co*., 190 F.3d 963, 970–73 (9th Cir. 1999).

41. Certification of summary judgment denial by a federal District Court, for Circuit Court discretionary review, under 28 U.S.C. § 1292(b), has infrequently resulted in successful interlocutory appeal. *See, e.g., Washington Post v. Keogh*, 365 F.2d 965, 967 (D.C. Cir. 1966); *Herbert v. Lando*, 781 F.2d 298, 304 (2d Cir. 1986).

42. *See, e.g., Desmond v. News & Observer Pub. Co*., 772 S.E.2d 128, 134 (N.C. Ct. App. 2015) ("Our Courts have recognized that because a misapplication of the actual malice standard when considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech, a substantial right is implicated.") (citing *Boyce & Isley, PLLC v. Cooper*, 710 S.E.2d 309, 314 (N.C. Ct. App. 2011)), appeal dismissed, review denied, 776 S.E.2d 195 (N.C. 2015); *Scottsdale Publ'g, Inc. v. Superior Ct*., 764 P.2d 1131, 1133 (Ariz. Ct. App. 1988) (while acknowledging that such interlocutory appeals must remain "a rarity," stating "We make an exception in this case in furtherance of the public's significant first amendment interest in protecting the press from the chill of meritless actions."); *Twin Coast Newspapers, Inc. v. Superior Ct*., 208 Cal. App. 3d 656, 662 (1989); *see also Cox Enter., Inc. v. Bakin*, 426 S.E.2d 651, 651 (Ga. Ct. App. 1992); Jones v. Palmer Commc'ns., Inc., 440 N.W.2d 884, 888 (Iowa 1989); *Romero v. Thomson Newspapers, Inc.*, 648 So.2d 866, 870 (La. 1995); *Aldoupolis v. Globe Newspaper Co.*, 500 N.E.2d 794 (Mass. 1986); *Spreen v. Smith*, 394 N.W.2d 123, 124 (Mich. Ct. App. 1986); *Rye v. Seattle Times Co*., 678 P.2d 1282, 1283–84 (Wash. Ct. App. 1984); *Pendleton v. Utah State Bar*, 16 P.3d 1230, 1231 (Utah 2000).

43. *See* S.D.C.L. § 20-10A-2.

44. *See* P.J. Huffstuder, *ABC "Pink Slime" Case Headed for Trial After Appeal Is Rejected*, REUTERS (Apr. 5, 2017).

45. *See* Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1, 7 (1992) ("the governing metaphor is a scale especially rigged by the First Amendment: a thumb is placed on the side of speech."); *see also* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 S. CT. REV. 1, 28 (declaring that the First Amendment requires "that the thumb of the Court be on the speech side of the scales").

46. S*ee, e.g., Broaderick v. Oklahoma*, 413 U.S. 601 (1973); *Bd. of Airport Comm'rs. of Los Angeles v. Jews for Jesus, Inc*., 482 U.S. 569 (1987).

47. *See, e.g., Smith v. Gogue*n, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.").

48. *See, e.g., United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 2544 (2012) (the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality") (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)).

49. *Philadelphia Newspapers Inc. v. Hepps,* 475 U.S. 767 (1986). And, as noted above, in libel law, too, public officials and public figures must not only prove the defendant published with "actual malice," but they must do so through the constitutionally-mandated evidentiary standard of "clear and convincing" proof.

50. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965).

51. *Id*. at 487.

52. *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967) (citations omitted).

53. Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1804 (1998).

54. *See* Julia Marsh, *Denton a Debt Man Walking: New Gawker Court Nix*, N.Y. POST, July 20, 2016.

55. Writing in VANITY FAIR, James Warren declared that "[t]he numbers floating around as far as [ABC's] legal expenditures so far are giant, on an order of well over $50 million." James Warren, *ABC Quietly Settles Massive $5.7 Billion Case*, VANITY FAIR (Jun. 29, 2017).

56. Tim L. Waltner, National Spotlight, Freeman Courier (Aug. 16, 2017), http://www.freemansd.com/article_efed43aa-82a0-11e7-b64b-77e23bccefa2.html.

57. Jonathan Berr, *Disney "Pink Slime" Lawsuit Settled for Whopping $177 Million*, CBS MONEYWATCH (Aug. 10, 2017).

58. PR Newswire, June 28, 2017.

59. Subsequently, one of BPI's owners told the press "there were a lot of zeroes" on the check they'd received and "ABC made us an offer that we just could not refuse." Nick Hytrek & Regina Roth: *ABC Offer Too Good for BPI to Refuse*, SIOUX CITY J. (July 17, 2017).

60. Nick Hytrek, *BREAKING: BPI Settles Defamation Suit with ABC*, SIOUX CITY J. (June 28, 2017).

61. *Id*.

62. http://video.foxnews.com/v/5500675860001/?#sp=show-clips.

63. *See, e.g.*, David Uberti, *Everything about Disney and ABC's "Pink Slime" Settlement Should Scare the Hell Out of You*, Splinter News (Aug. 18, 2017) ("'The settlement suggests that news organizations will cave under the pressure of litigation, even in cases in which they have good defenses,' Jonathan Peters, a media law professor at the University of Georgia and press freedom correspondent for the Columbia Journalism Review, told Splinter. "), https://splinternews.com/everything-about-disney-and-abcs-pink-slime-settlement-1797827920; Teresa Lo, *Disney Must Pay $177 Million to Settle "Pink Slime" Defamation Lawsuit*, JD Journal (Aug. 11, 2017) ("Leonard Niehoff, a law professor at the University of Michigan, said that the pink slime settlement could inspire others to also sue media companies."), http://www.jdjournal.com/2017/08/11/disney-must-pay-177-million-to-settle-pink-slime-defamation-lawsuit.

64. *Webb v. Virginia-Pilot Media Cos, LLC*, 752 S.E.2d 808, 810 (Va. 2014).

65. *Id*. at 811–12.

66. *Hatfill v. N.Y. Times*, 427 F.3d 253, 255 (4th Cir. 2005) (Wilkinson, J., dissenting from denial of rehearing en banc).

67. Richard N. Winfield, *Interlocutory Appeal as of Right: The Time Has Come*, 17 COMM. L. 18 (ABA Spring 1999). Professor Susan Gillies similarly advocated for this procedural reformation. *See* Gillies, supra, n.3 at 1801.