Hinerman v. Gazette: A Pro-Victim Shift in West Virginia Libel Law

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I. INTRODUCTION

[Libel law is slowly shifting to become more solicitous of the rights of injured victims. Only by understanding the reasons for the pro-victim shift can the bar help their media clients to conform to the law with negligible self-censorship side effects.]

—Justice Richard Neely

Justice Neely's warning in *Hinerman v. Daily Gazette Co., Inc.* put newspapers and the legal community on notice that the West Virginia Supreme Court of Appeals has embraced a new vision of libel law. The tangled state of national libel law often leaves the journalist with the unanswerable question of whether or not to publish an article. The inevitable time restraints of the newspaper business dictate that quick decisions be made by an editor or publisher, who will in turn look to the lawyers of West Virginia for guidance. The bar must there-

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2. 423 S.E.2d at 574.
fore be aware of any substantive or policy changes in libel law made by Hinerman.

Initially, the most glaring impression of Hinerman is that the case produced two adamant and controversial opinions. Justice Neely wrote the majority opinion in favor of the plaintiff, Attorney Raymond Hinerman.³ He commented on the “surpassing ego and unbridled ignorance” of the Gazette,⁴ “[t]he excesses of ‘yellow journalism,’”⁵ and the “rediscovery that the popular media are in the entertainment business far more than they are in the information business.”⁶ In turn, the majority opinion evoked a blistering response from the dissent, through Justice Miller. The dissent rejected the majority opinion as “badly botched” and suggested that “[w]ere it not for judicial immunity, . . . the Gazette would have a good libel suit against the majority.”⁷

It is certain that this case is controversial. However, it remains to be seen whether Hinerman represents a material change in law. The purpose of this note is to review West Virginia’s libel law in light of the Hinerman decision and to provide guidance to newspapers and their lawyers as to the current state of the law.

II. BACKGROUND OF LIBEL LAW IN WEST VIRGINIA

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; ‘tis
something, nothing,
Twas mine, ‘tis his, and has been slave to
thousands;
But he that filches from me my good name
Robs me of that which not enriches him

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3. Id. at 565.
4. Id. at 579 n.30.
5. Id. at 575 n.23 (citing Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890)).
6. Id. at 575 (citing NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (1985) (emphasis omitted).
7. Id. at 584-85 (Miller, J. dissenting).
And makes me poor indeed.

Othello III, iii  

Man's desire to protect his good name is as ancient as man's history itself. Biblical 9 and literary references 10 to the preservation of reputation are plentiful. In modern times, the law of defamation has become the method by which reputation is protected in the courts. The West Virginia Constitution, while insuring the freedom of speech and of the press, allows the Legislature to provide necessary penalties, including damages, for libel and defamation of character. 11 Furthermore, in a civil libel suit, truth and good motives in publication will be an absolute defense. 12

A. West Virginia Media Law and Media Defendants

West Virginia libel law involving media defendants developed under the common law principles of the tort of defamation. 13 The burden was originally on the defendant in a libel action to prove that the allegedly libelous publication was, in fact, true in order to avoid liability. 14 Certain statements were considered libelous per se, such as a false accusation of a crime. 15 However, this strict liability for publi-

9. See, e.g., Ecclesiastes 7:1 ("A good name is better than precious ointment[.]").
10. See, e.g., Publicius Syrus, maxim 108 ("A good reputation is more valuable than money." (First Century B.C.)).
11. W. Va. Const. art. III, § 7 states:
No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

Id.
12. W. Va. Const. art. III, § 8 states that "[i]n prosecutions and civil suits for libel, the truth may be given in evidence; and if it shall appear to the jury, that the matter charged as libelous, is true, and was published with good motives, and for justifiable ends, the verdict shall be for the defendant."
13. See, e.g., Bower v. Daily Gazette Co., 104 S.E.2d 317 (W. Va. 1958) (malice may be inferred from the words used to destroy qualified privilege).
15. See, e.g., Sweeney v. Baker, 13 W. Va. 158 (1878); Milan v. Long, 88 S.E. 618,
cation of such false statements was tempered by common law privileges, developed to allow media defendants a defense to actions based on allegedly defamatory statements.

Both absolute and qualified privileges were used in West Virginia as defenses to alleged defamation, along with the defense of truth itself. Absolute privilege is based on the policy that certain activities require total freedom of expression without inquiry into the publisher’s motives. An absolute privilege insulates a defendant from liability, but is generally limited to (1) legislative, judicial, quasi-judicial, and other acts of the state; (2) defamation consented to or caused by the plaintiff; and (3) the broadcast of statements made by political candidates. At one time, a citizen was afforded absolute immunity in West Virginia when petitioning the government for redress. However, the “actual malice” standard of New York Times Co. v. Sullivan was recently held to apply to intentional and reckless falsehoods during such petitioning, eliminating absolute privilege.

Qualified privileges have been available to West Virginia defendants as a defense to defamation, based on the theory that it is essential that information be disseminated in order to protect individual or public interests, even though inaccuracies are, from time to time,
inevitable. Qualified privilege exists when a publisher makes a good faith statement about a subject pursuant to a special interest or duty, and the publication is limited to people who have a legitimate interest in the subject. "Fair comment," protecting opinion, and "fair report," protecting accurate reporting, are the two commonly recognized qualified privileges available to the press. These privileges, however, were ineffectual in West Virginia if abused or exceeded. In 1943, West Virginia became one of a minority of states which embraced the qualified privilege for a media defendant who makes a good faith, reasonable misstatement about the duties of a public official. The West Virginia Supreme Court acknowledged that, in order to protect society's interest in governmental affairs, publishers acting in good faith should be protected from strict liability for misstatement of fact. In 1964, the national landmark libel case, New York Times Co. v. Sullivan cited Bailey with approval, bringing the common law privilege of fair comment within the protection of constitutional law.

Different types of libel plaintiffs were recognized early in West Virginia libel law, and standards have developed in accordance with

23. Crump, 320 S.E.2d at 78 (citation omitted).
26. See, e.g., England, 104 S.E.2d at 311-12; Bower v. Daily Gazette Co., 104 S.E.2d 317, 319 (W. Va. 1958) (malice may be inferred by a jury where qualified privilege has been abused or exceeded).
28. Id.
31. See Sweeney, 13 W. Va. at 183 (acknowledging the important public interest in commenting on candidates for public office); Swearingen, 26 S.E.2d at 215 (explaining that the public has an interest in the actions of a public officer).
constitutional interpretation to differentiate between private and public plaintiffs.32 "The essential elements for a successful defamation action by a private individual are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury."33 However, a public official or candidate for public office must prove that:

(1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with the knowledge at the time of publication that they were false or misleading or were published with a recklessness and willful disregard of truth; and (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material.34

This standard incorporates the constitutional "actual malice" standard mandated by the United States Supreme Court in New York Times v. Sullivan.35


34. Sprouse, 211 S.E.2d at 679. See also Long, 346 S.E.2d at 780; Dixon, 416 S.E.2d at 238.

35. 376 U.S. at 280.

National libel law changed drastically after the New York Times decision. That 1964 case involved a libel suit by Sullivan, a City Commissioner who was responsible for the Montgomery, Alabama police department against defendants who published an advertisement soliciting donations for the civil rights movement. Sullivan alleged that falsities in the ad had defamed him. Justice Brennan held, however, that in order for a public official to recover damages for a defamatory falsehood relating to his official conduct, he must prove "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The case applied First Amendment theory to libel law and provided constitutional protection to insure that no libel judgment intrudes on freedom of expression. In the following years, the Court defined and extended the New York Times doctrine.

In Gertz v. Robert Welch Co. the United States Supreme Court defined a new standard for awards in libel cases. Although at common law damages were available to libel plaintiffs irrespective of injury, Gertz established that unless the New York Times standard of "actual malice" is found, only a recovery for actual injury is allowed. Following Gertz, the West Virginia Supreme Court of Appeals decided that a jury may consider mental anguish, insult, indignity

36. Id. at 257-60.
37. Id. at 256.
38. Id. at 279-80.
39. Id. at 270-71.
40. Id. at 285.
44. Sack, supra note 30, at part VI.A.
45. 418 U.S. at 349.
and humiliation in awarding actual damages in a libel action. Punitive damages are likewise permissible, but only "in cases where the award of actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future." In Sprouse, Justice Neely found that a $500,000 punitive award was excessive in light of the actual damage award of $250,000. The actual damage award was deemed adequate to dissuade similar willful and reckless conduct in the future, and allowing the punitive award to stand would have had a chilling effect, leading to press self-censorship. However, as the most recent case law suggests, punitive damages will be awarded in West Virginia when common law malice exists in order to deter malicious, as well as extremely negligent behavior which is likely to cause harm.

West Virginia has codified the common law principle that a retraction serves as evidence for mitigating punitive and compensatory damages. Although New York Times stated that the failure to retract does not necessarily indicate the presence of actual malice at the time of initial publication, some courts have followed the proposition that a prompt retraction may be used as evidence that the misstatement was

46. Sprouse v. Clay Communications, Inc., 211 S.E.2d 674 (W. Va. 1975). The Charleston Daily Mail used oversized headlines in articles, two weeks before the election about gubernatorial candidate James Sprouse's real estate transactions. The headlines were found to have a defamatory implication because they led the average reader to a different conclusion than the facts given in the articles.

47. Id. at 692.

48. Id.

49. Id. Although the amount of punitive damages is within the province of the jury, other courts have likewise adjusted libel awards. See, e.g., Lerman v. Flynt Distributing Co., 745 F.2d 123 (2d Cir. 1984) (explaining that a $33 million punitive award shows an appeal to passion or prejudice of the jury), cert. denied, 471 U.S. 1054 (1985). But see Newton v. National Broadcasting Co., 677 F. Supp. 1066 (D. Nev. 1987) (explaining that in light of defendant's net worth of $2 billion, the $5 million punitive award does not shock the court's conscience), rev'd on other grounds, 930 F.2d 662 (9th Cir. 1990), cert. denied, 112 S. Ct. 192 (1991).

50. TXO Production Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 887-88 (W. Va. 1992) (affirming a $10,000,000 punitive and $19,000 compensatory award in a slander of title action because the defendant had moved from the "really stupid" to the "really mean" category), aff'd, 113 S. Ct. 2711 (1993).


accidental, and may therefore help establish a lack of actual malice at the time of publication.53

In order to balance the First Amendment guarantee of freedom of the press with the individual's interest in not being defamed, New York Times mandated independent review of the record of all public figure or public official actual malice cases.54 In Sprouse, the West Virginia Supreme Court found it essential "both to consider the law and to make an independent evaluation of the evidence to insure First Amendment protection to publishers."55 The nature of this review has been refined, in light of Bose Corp. v. Consumer Union of United States, Inc.,56 to require that courts decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning.57 If the statements are capable of defamatory interpretation, the court is then required to review the evidence of defendant's actual malice as it was presented by the public figure plaintiff during the trial, in order to determine if the evidence will support the verdict under a clear and convincing standard.58

Before New York Times, the West Virginia Supreme Court was one of a minority of states which protected good faith defendants who spoke out on the conduct of public officials.59 Throughout the years, very few libel awards against media defendants have been sustained by

54. 376 U.S. 254, 285 (1964). Although it is agreed that an independent review of whether actual malice existed at the time of publication is required, the courts are split on whether the court is also required to conduct an independent review of the predicate issue of falsity. See discussion infra part V.
57. Long, 346 S.E.2d at 780; see also Dixon, 416 S.E.2d at 241.
58. See Dixon, 416 S.E.2d at 244-45 ("[A]fter reviewing both the transcripts of the proceedings below and the contents of the two newspaper articles . . . , we conclude that the plaintiffs did not present the clear and convincing evidence of actual malice that public officials are required to show in order to sustain an action for libel.").
59. Bailey, 27 S.E.2d at 844.
the West Virginia high court, and the court frequently reiterated its commitment to the protection of the First Amendment freedom of the press. The question, then, is whether Hinerman v. Gazette represents a change in that commitment.

III. STATEMENT OF THE CASE

The dispute in Hinerman v. Gazette involves the publication of an editorial by the Charleston Gazette on May 20, 1983. However, the case hinges on the events which occurred prior to the publication concerning the plaintiff, Raymond Hinerman, a lawyer, and his former client, Sam Levin.

Mr. Levin was a Russian immigrant who worked in Wheeling as a coal miner until he had a heart attack. He then filed a Workers’ Compensation claim, availing himself of the services of the United Mine Workers’ free legal representative: Raymond Hinerman. Mr. Levin protested the original 20 percent compensation award. During Mr. Levin’s appeal, Mr. Hinerman left the UMWA, and the UMWA hired a new lawyer. Mr. Levin, however, retained Mr. Hinerman as private counsel to pursue the appeal and Mr. Levin signed a standard contin-

60. See, e.g., Hinerman, 423 S.E.2d at 571 ($75,000 compensatory and $300,000 punitive damages upheld); Sprouse, 211 S.E.2d at 680-81 (upholding $250,000 in actual damages and striking $500,000 in punitive damages as excessive); Chambers v. Smith, 198 S.E.2d 806 (W. Va. 1973) (holding that a $7,000 award was not excessive in a libel suit brought by a principal and vice principal of a high school against the county school board). But see Average Jury Libel Award Rises to Nine Million Dollars, N. Y. TIMES, Sept. 20, 1992 at 14 (a study by the Libel Defense Resource Center says the average national libel award from 1990-1991 was nine million dollars compared with $1.5 million from 1980 to 1989).

61. See, e.g., Sprouse, 211 S.E.2d at 689 (advocating “strong sympathy toward protection of the robust political discussion contemplated by the First Amendment’’); Long, 176 S.E.2d at 784-86 (applying a stricter standard in appraising defamation actions by public officials or public figures for motion to dismiss, in light of the public policy that “erroneous statement is inevitable in free debate . . . [and] must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive’” (quoting New York Times, 376 U.S. at 271-272)).


63. Id.

64. Id.

65. Id.
gent fee contract. The appeal was ultimately successful and Mr. Levin was to receive nearly $20,000 in back benefits and a stipend of $1,162 per month.

A dispute as to Mr. Hinerman’s fee ensued. Mr. Levin, who had moved to Florida, revoked Workers’ Compensation’s authority to send his benefit check to Mr. Hinerman, thus preventing the lawyer from deducting his fee. Mr. Hinerman billed Mr. Levin, and eventually filed suit in circuit court to collect the fee pursuant to the contract. Mr. Hinerman was given a default judgment against Mr. Levin which was upheld against motions to vacate. Mr. Levin, through his new attorney, Mr. Gold, then filed a petition with the West Virginia Supreme Court. The allegations in that petition became the subject of the disputed Gazette editorial.

The Gazette ran a news article on May 18, 1983 relating the allegations set out by Mr. Gold in the petition. The article described the fee dispute as well as Mr. Levin’s claims that the fee was excessive and that he had not understood the fee agreement because of his limited English ability. Additionally, the article described Mr. Levin’s claim that he could not afford to hire a lawyer to represent him in the suit brought by Mr. Hinerman, and that he had attempted to file pro se, but that these attempts were rejected by the court because they “failed to comply with the rules.” The article further cited the petition stating that the judge ruled that “Hinerman could

66. Id. The contract called for Hinerman to receive twenty percent of Mr. Levin’s compensation for 208 weeks.
67. Id. at 565.
68. Id. at 566.
69. Id.
70. Id.
71. Ultimately, the court upheld the circuit court’s default judgment, finding in favor of Mr. Hinerman. The court did, however, allow Mr. Levin a $600.00 reduction based on the fee paid to Hinerman by the UMW. Hinerman v. Levin, 310 S.E.2d 843 (W. Va. 1983).
72. Hinerman, 423 S.E.2d at 566.
73. Id. at 586 n.8 (Miller, J. dissenting). The news article is set out in its entirety in Justice Miller’s dissenting opinion.
74. Id.
75. Id.
attach 100 percent of Levin's Workers' Compensation benefits until the bill was paid[,]" and that "[t]he effect of this ruling is to give to the plaintiff, a practicing attorney, all of the petitioner's income while the petitioner, who is totally disabled, has no source of income whatsoever."\textsuperscript{76}

Two days later James Haught wrote and published an editorial in the \textit{Gazette} entitled "Lawyer Ethics" which again recited the allegations as set out in Mr. Levin's petition and in the earlier \textit{Gazette} article.\textsuperscript{77} Subsequently, Mr. Haught and W.E. Chilton III,\textsuperscript{78} received

\begin{footnotes}
\item[76] Id. at 566. The entire editorial reads:

\textbf{LAWYER ETHICS}

The State Bar ethics committee which guards against lawyer misconduct—and also the Judicial Inquiry Commission which watches over judges—should keep an eye on a current state Supreme Court case.

It involves a sick immigrant miner who won disability payment, but his lawyer took every penny, getting $12,000 for one day's work. (The lawyer said the old man was lucky because $1,000 of the miner's legal expense was billed to a different client). A judge allowed it to happen because a letter from the immigrant didn't meet proper legal form.

Allegations before the high court:

Sam Levin, a Russian native, moved to Wheeling and worked for Consolidation Coal Co. until he suffered a heart attack. UMW attorney Ray Hinerman, paid by the union, represented Levin free before the Workers' Compensation Fund. The miner was granted 20 percent disability.

Hinerman quit the UM and represented Levin privately in an appeal. After a one-day hearing, Levin was granted 100 percent disability. Hinerman sent the examiner a bill for $4,202. Levin didn't pay. The lawyer sued in Hancock County Circuit Court, demanding $12,088.

Levin wrote a letter to Judge Callie Tsapis saying he couldn't afford to hire another lawyer to answer the suit, but felt he owed Hinerman nothing. "I am convinced that Mr. Hinerman used my ignorance and lack of skill in language and law to his advantage." Ms. Tsapis ruled that the letter didn't constitute a legal reply. She gave Hinerman a default judgment and allowed him to seize 100 percent of Levin's Worker's Compensation benefits.

A different lawyer came to Levin's aid and appealed to the Supreme Court. The petition says Hinerman, incredibly, testified that he did the old miner a favor by billing $1,000 worth of Levin's expenses to another client.

The case hasn't been decided, but it implies that another helpless client has suffered at the hands of a lawyer. The legal ethics committee should monitor the case closely. Unfortunately, the committee usually won't act unless an official complaint is filed in proper legal form—and then the committee focuses on tedious technicalities rather than basic morality, right and wrong.
\end{footnotes}
several phone calls from Mr. Hinerman's associates challenging the veracity of the editorial. Mr. Haught suggested that Mr. Hinerman write a letter to the editor. Instead, Mr. Hinerman filed an expedited brief in the Supreme Court. The Gazette took Another Look in an editorial two weeks later, referring to the case as a "tangle of contradictions." This piece enumerated several of Mr. Hinerman's assertions from the reply brief. Notably, the editorial said that the reply attacked "the deliberate distortion that the effect of the ruling by the circuit court gave Raymond A. Hinerman 100 percent of Sam Levin's Workers' Compensation benefits" when Mr. Levin actually got "$12,640 temporary total disability benefits, $20,895 lump sum benefits and $1,162 a month for the rest of his life—a potential $350,000 to $400,000, of which the attorney's share constitutes only 3 percent." 

Mr. Hinerman subsequently brought this libel action against the Gazette. A jury in Brooke County awarded Mr. Hinerman $75,000 in actual damages and $300,000 in punitive damages.

IV. THE COURT'S OPINION

The Supreme Court of West Virginia agreed to review the judgment to evaluate if it was in accord with the freedom of the press and First Amendment principles as set out in New York Times and its

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As for Judge Tsapis, nothing she might do would be surprising. She once hosted a party at which crooked lawyers under prison sentence or indictment were hailed as heroes. The Judicial Inquiry Commission found nothing wrong with her conduct then. Still, the commission should ask why she allowed a lawyer to take all the public money granted to an impoverished ex-miner too sick to work.

Id. (emphasis added).

78. Id. at 567. At the time the editorial was published, Mr. Chilton was the Publisher of the Gazette.

79. Id. at 569-70. See also id. at 569-70 nn.5, 7, 9, 10, 12, 13, 16 (testimony of Fred Risovich, II, William Fahey, and Michael Nogay recounting conversations with Mr. Haught and Mr. Chilton).

80. Id. at 571. Hinerman and his associates were concerned that it would be unethical to respond to the editorial in the form of a letter to the editor. On advice from Bar Counsel, they opted to send an expedited brief. Id. at 571 n.16.

81. Id. The second editorial is reprinted in its entirety. See id. at 570.

82. Id. at 571.

83. Id. at 565.
progeny. The Court was divided three to two in affirming the jury award. Justice Neely wrote the majority opinion, joined by Justice Workman and Senior Justice Caplan. Justice Miller, joined by Justice Brotherton, wrote the scathing dissent which accuses the majority writer of "unbridled ignorance" and invites United States Supreme Court review of this "badly botched" decision. The two high-spirited opinions reflect the difficulty which a court faces when deciding a First Amendment libel case.

A. The Majority Opinion: A Pro-Victim Shift

Justice Neely observes a pro-victim shift in recent United States Supreme Court First Amendment libel cases, which prompts him to offer a clarification of the current state of the media's privileges and obligations in West Virginia. In so doing, he states that the jury was warranted in finding that Raymond Hinerman was libeled by the Gazette editorial and that the award was appropriate. In a six part decision, Justice Neely reviews the case itself, and offers guidance to lawyers in their quest to help "media clients to conform to the law with negligible self-censorship side effects."

Part one of the decision discusses the proper standard by which a public official libel action should be evaluated. In order to recover

84. Id. at 571 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)). See discussion supra part II.B.
86. Hinerman, 423 S.E.2d at 596.
87. Id. at 590 n.14.
88. Id. at 595.
89. Id. at 584.
90. Id. at 574.
91. Id. at 571.
92. Id. at 574.
93. Id. at 571-76. In part VI of the decision, however, Justice Neely determines that Mr. Hinerman was not a public official according to United States Supreme Court standards. See discussion infra part IV.A.
for damages, a plaintiff must show by clear and convincing evidence\textsuperscript{94} that:

(1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.\textsuperscript{95}

Neely views the final requirement of showing a publisher’s “subjective appreciation” of falsity or recklessness, which is a restatement of the actual malice standard, as the most difficult burden.\textsuperscript{96} The additional \textit{New York Times} requirement that the trial and appellate courts must conduct an independent review of the facts establishing actual malice adds to the plaintiff’s burden.\textsuperscript{97}

The opinion devotes substantial analysis to a shift in the United States Supreme Court’s libel decisions, which reflect “an ebbing tolerance for irresponsible media behavior.”\textsuperscript{98} In support of this proposition, Justice Neely first cites the fact that the Court has showed a “waning enthusiasm” for review of such cases.\textsuperscript{99} He suggests that recent cases upholding \textit{New York Times}\textsuperscript{100} are “mere genuflections as each year the Court moves farther away from the broad holdings” of that landmark case.\textsuperscript{101} Likewise, he asserts that the Court has drawn

\begin{itemize}
\item \textsuperscript{94} \textit{Id.} at 571.
\item \textsuperscript{96} \textit{Id.} at 572. Subjective appreciation of falsity or recklessness refers to the \textit{New York Times} actual malice standard. \textit{See} 376 U.S. at 279-80.
\item \textsuperscript{97} \textit{Id.} at 572. The opinion states that the standard of independent judicial review has become less stringent than that which was first enunciated in \textit{New York Times}.
\item \textsuperscript{98} \textit{Id.} at 572.
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Id.} at 572 n.17 (citing Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); Hustler Magazine v. Falwell, 485 U.S. 46, 49 (1986)).
\item \textsuperscript{101} \textit{Id.} at 572.
\end{itemize}
narrow holdings in all of its recent libel cases, and denied petitions for certiorari in twenty similar cases. Next, Justice Neely supports the proposition that the United States Supreme Court’s position has changed by pointing to the United States Supreme Court’s endorsement of a ‘‘clearly erroneous’’ standard for reviewing jury findings of fact, and recognition that egregious deviation from accepted journalistic standards and ill will toward the victim are admissible circumstantial evidence of actual malice. Therefore, the use of circumstantial evidence may now be used to prove that a publisher had actual malice when he published the defamatory piece. Such circumstantial evidence may include not only the deviation from journalistic norms, but also “partisanship, ill will toward the subject of a libel and other ‘malicious’ motives.”

The majority next offers reasons for the shift in libel law which makes it “more solicitous of the rights of injured victims.” Using an excerpt from a study entitled The Media Elite, Justice Neely explains that during the Watergate era, the press enjoyed a golden period because journalists were perceived to be on the “‘right side’ of the critical conflicts of a turbulent age.” However, the public became disenchanted with media negativism and unfairness during the 1980s, perhaps because problems were less easily explained and solved. Also, “more sinister, self-serving forces” add to the public’s demand for greater press accountability. The public, Justice Neely contends, rediscovered that which was temporarily obscured during the Watergate era: “that the popular media are in the entertainment business far more than they are in the information business.”

102. Id. at 572 n.17 (citations omitted).
103. Id. at 572.
105. Hinerman, 423 S.E.2d at 573 (citing Harte-Hanks, 491 U.S. at 667-68 n.18).
106. Id. at 573.
107. Id.
108. Id. at 574.
109. Id. at 574 n.20 (citing ROBERT LICHTER ET AL., THE MEDIA ELITE 15-16 (Adler and Adler 1986)).
110. Id. at 574.
111. Id.
112. Id. at 575.
113. Id. (citing NEIL POSTMAN, AMUSING Ourselves to Death: Public Discourse in
Unfortunately, "sensational or 'entertaining' scandal" is necessary for economic success in the media world, because "mankind has an inveterate predilection to rejoice in the suffering and degradation of others."\textsuperscript{114}

Justice Neely acknowledges that stricter libel laws could, however, jeopardize full, robust debate in our society. Therefore, it is necessary that courts remain "more solicitous of the media than of any other class of business defendants in our tort system," by requiring clear and convincing evidence of actual malice in libel cases.\textsuperscript{115}

In the second section of the \textit{Hinerman} decision, the majority turns to the issue of independent judicial review. \textit{New York Times} requires that a reviewing court make "an independent evaluation of the facts to determine whether the jury's verdict was correct and liability can properly be imposed upon a media defendant."\textsuperscript{116} The standard of review is further defined in \textit{Harte-Hanks} and requires that the reviewing court consider the full factual record, "under a clearly erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witness."\textsuperscript{117} This means the court must "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment protect."\textsuperscript{118}

Accordingly, the Court undertook a factual review of the record and determined that:

\textsuperscript{114} Id. Justice Neely quotes a passage from Tennyson, \textit{Idylls of the King, Merlin and Vivian} 135 (New American Library Edition), as illustrative of this proposition. \textit{Id.}

\textsuperscript{115} Id. at 575-76. No objective, reasonable person standard applies to public officials or candidates libel cases. Rather, the media will be held accountable only when subjective appreciation of falsity or recklessness is shown by clear and convincing evidence. \textit{Id.} at 576. Justice Neely further explains that media accountability is not dissimilar to judicial accountability because of the possibility of "chilling effects" in both instances. However, he differentiates the judiciary from the press because the former is accountable through the canon of ethics to the public. "This system may not be perfect, but it is better than anything the media have." \textit{Id.} at 576 n.26 (citing \textit{WEST VIRGINIA JUDICIAL CODE OF ETHICS} [1973, as amended]; W. VA. CONST., art. VIII, § 8).

\textsuperscript{116} Id. at 576.

\textsuperscript{117} Id. (citing \textit{Harte-Hanks}, 491 U.S. at 688-89).

\textsuperscript{118} Id.
there was clear and convincing evidence that the writer of the editorial, Mr. Haught, at the time the editorial was written, either knew that the impression of dishonesty and unethical conduct that the editorial intentionally conveyed was false, or that Mr. Haught published the editorial with the subjective appreciation that, at least, he was recklessly disregarding the truth.  

The majority supports the holding by pointing to direct evidence of subjective appreciation "from Mr. Haught and those who talked with Mr. Haught soon after the libelous editorial was written."  

Likewise, he points to "strong circumstantial evidence emerging from gross deviations from generally accepted standards of journalism[,]" such as making no effort to contact Mr. Hinerman for a comment before publishing the editorial.  

Additionally, Mr. Haught's testimony indicated that he had misgivings about the editorial, and the record supported a jury inference that the Gazette's publisher, Mr. Chilton, who "bore strong animus toward lawyers in general," explicitly directed that the editorial be written despite Mr. Haught's misgivings.

As a final step in factual evaluation, Justice Neely points to the original Levin-Gold petition filed with the West Virginia Supreme Court. The editorial neglected to include that portion of the petition which complained that one hundred percent of Mr. Levin's benefits would go to Mr. Hinerman until twenty percent of the benefits already awarded, plus costs, were paid to the lawyer, and that only

119. Id.
120. Id. Apparently, Justice Neely is referring to Mr. Haught's direct examination during the trial, at which time he said that he had conversations with Mr. Hinerman during a prior scandal which Haught had investigated. Haught said that as far as he knew, Hinerman was an honorable and straight-forward man, id. at 570 n.14, and that he had been surprised at the present allegations. Id. at 570 n.11.

Testimony of Mr. Hinerman's associates concerning their telephone conversations with Mr. Haught following the publication of the editorial are also alluded to as direct evidence of Mr. Haught's subjective appreciation: William Fahey's testimony indicated that Mr. Haught told Fahey in a telephone conversation that Haught "knew of Ray Hinerman, knew that he wouldn't be involved in that." Id. at 569 n.7. Michael Nogay's testimony was essentially the same as Mr. Fahey's. Id. at 570 n.10.

121. Id. at 576-77.
122. Id. at 577.
123. Id.
after Mr. Hinerman had been paid would Mr. Levin receive any of the award.\textsuperscript{124} Instead, by basing the editorial on the petition's assertion that "[t]he effect of the ruling is to give the plaintiff, a practicing attorney, all of petitioner's income while the petitioner, who is totally disabled, has no source of income whatsoever[,]" the newspaper intentionally avoided the truth. Such intentional avoidance supports the finding of actual malice essential in a libel action.\textsuperscript{125} Further, an earlier Gazette news article included the distinction between twenty percent of benefits already paid and all of Mr. Levin's award. The truth was, therefore, generally known and available. Consequently, the omission of those facts is additional circumstantial evidence of actual malice.\textsuperscript{126}

Part three of the majority opinion considers the Gazette's argument on appeal that the paper is immune from liability through qualified privilege, even though the editorial was false and defamatory.\textsuperscript{127} The Gazette asserted two privileges: the privilege of fair comment and the privilege to report official proceedings or public meetings.\textsuperscript{128}

The West Virginia Supreme Court has recognized the privilege of fair comment\textsuperscript{129} which protects editorial comment.\textsuperscript{130} Because "sharp, vituperative and biting criticism are at the heart of free debate," the court will protect opinion unless it "implies undisclosed defamatory facts."\textsuperscript{131} Justice Neely offers an example that if the editorial had simply stated the writer's opinion that "all lawyers are low-life and Mr. Hinerman, by membership in the legal profession, must on that account be low-life as well, the editorial would be privileged as fair comment."\textsuperscript{132} Likewise, the privilege to report official pro-

\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} (citing Dixon v. Ogden, 416 S.E.2d 237, 238 (W. Va. 1991) ("Evidence that a media defendant intentionally avoided the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel.").
\textsuperscript{126} \textit{Id.} at 577.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.} at 577-78. \textit{See} discussion \textit{supra} part II.B.
\textsuperscript{129} \textit{Id.} at 577 (citing Havalunch v. Mazza, 294 S.E.2d 70 (W. Va. 1981)).
\textsuperscript{130} \textit{Id.} (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).
\textsuperscript{131} \textit{Id.} (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1986)).
\textsuperscript{132} \textit{Id.} at 577.
ceedings or public meetings would have applied in this case if the editorial had simply stated, or fairly abridged, the allegations set out in the Levin petition because this privilege applies only "if the report is accurate and complete or a fair abridgement of the occurrence reported." 133

However, in this instance, the majority suggests that the Gazette mistakenly attempted to mix the two privileges. A reader of an article reporting a court pleading is at least on notice that the allegations are one-sided. Likewise, a reader of a derogatory editorial, which does not allege or imply supporting facts, is on notice that the editorial is merely the writer's opinion. A problem arises, however, when the two are combined because "the reader is led to believe that the editorial writer has access to undisclosed defamatory facts that lead him to believe the allegations he is reporting from the court proceeding are correct[]." 134 Justice Neely concludes that the privileges do not apply because the editorial "made additions of its own to what would otherwise be a privileged report of a court proceeding that conveyed a defamatory impression, imputed corrupt motives to the plaintiff, and indicted the integrity of the plaintiff." 135 The combination of allegations from a court proceeding and editorial opinion, then, afford the editorial neither the protection of the fair report privilege nor the fair comment privilege. 136

Next, the majority opinion turns to the issue of punitive damages, embracing the "offer of fair settlement" criterion of Garnes v. Fleming Landfill, 137 and the reasonable relationship criterion of TXO Production Corp. v. Alliance Resources. 138 The Gazette argued that the punitive award of $300,000 should be struck because of its chilling effect upon First Amendment rights. 139 However, the court holds that "[n]o

133. Id. (citing RESTATEMENT (SECOND) OF TORTS § 611 (1977)).
134. Id. at 577.
135. Id.
136. Id. at 577.
137. Id. at 578, 582 (citing Fleming Landfill v. Garnes, 418 S.E.2d 897 (W. Va. 1991)).
138. Id. at 582 (citing TXO Production Corp. v. Alliance Resources, Corp., 419 S.E.2d 870 (W. Va. 1992)).
139. Id. at 578.
case could be stronger for punitive damages” in light of the facts that (1) the case was tried on the public official theory requiring clear and convincing proof of actual malice and (2) the Gazette offered no retraction, apology, or offer to amend for its defamatory statement. 140

The sub-issue of retraction, then, is analyzed in light of the current law and public policy concerning media defendants and First Amendment rights in the hopes of resolving the tension among: “(1) the public’s demand for accountability; (2) the surpassing arrogance of the media; and, (3) the courts’ justified concerns that punitive damages will lead to excessive self-censorship.” 141

In Garnes, the court held that one factor used in determining the excessiveness of punitive damages is whether the defendant made a timely offer of compensation once liability became clear to the defendant. 142 This criterion is justified because in addition to the substantial privileges accorded to the media, the court is also “entitled to impose corresponding obligations, [such as an apology or an attempt to make amends once liability is clear,] when the media’s fulfillment of those obligations will not compromise free speech one iota or lead to self-censorship.” 143 A media defendant who meets this obligation would be entitled “to ask to be treated differently for the purposes of punitive damages from the media defendant who persists in allowing the victim’s reputation to suffer,” 144 and may, in fact, be shielded from punitive damages altogether. 145 However, if that obligation is not met by the media defendant, no free speech consideration is implicated and, for the purposes of punitive damages, libel will be treated no differently than “any other tort matter involving willful injury.” 146

140. Id. at 579.
141. Id. at 580. The opinion states that in light of the court’s anxiety of a chilling effect of punitive damages on the press, the court remains “willing to craft special rules governing punitive damages against media defendants in deference to First Amendment considerations.” Id.
142. Id. at 580 (citing Fleming Landfill v. Garnes, 413 S.E.2d 897, 899 (W. Va. 1991)).
143. Id. at 580.
144. Id.
145. Id. at 580 (citing Garnes, 413 S.E.2d at 899). The apology and offer of amends would not, however, shield the defendant from actual damages. Id.
146. Id. at 581. The opinion explains that “‘[l]ibel’ is the peculiar name given to the
Additionally, the majority considers public policy supporting punitive damage awards against media defendants by looking at the media as a whole and at the Gazette in particular. First, because local media are increasingly owned by and answerable to distant national "McMedia" corporations, wide-open liability for punitive damages would likely cause the corporations to impose unreasonably conservative procedures for their local management, thus producing nothing more than "AP bear stories, pictures of children eating ice cream cones on the Fourth of July, and food store advertisements." To avoid this chilling effect, it is proper to allow some latitude for human error when determining punitive damages, because, as Mr. Chilton’s tenure at the Gazette demonstrates, broad local control of a newspaper can lead to substantial benefit to the community. However, no protection from punitive damages is applicable where the defendant refuses to apologize or make amends for a known mistake. The majority believes that to temper punitive damages in such cases would nurture "arrogance and unaccountability rather than full and robust debate."

In light of the law and policy considerations, therefore, the court held that the punitive damage award was appropriate. The reasonable products liability law that applies to the media. We have not given the media favored status over automobile, stepladder and lawn mower manufacturers because we want arrogant, abusive, and irresponsible media companies; rather, we have given favored status to the media because we do not want to chill robust and untrammeled debate about public issues." Id. at 581 & n.34 (emphasis in original) (citing David A. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 432 (1975) (noting that "the products liability analogy to media is limited because of the media’s ability to decrease the risk ‘by increasing their self-censorship’").

147. Id. at 581.
148. Id.
149. Id. The opinion identifies that Mr. Chilton’s “editorial policy of strictly scrutinizing the behavior of lawyers led to one of the towering modern law reforms in this state, namely the abolition of the old ‘commissioners of account’ system under which political appointees received enormous fees for precious little effort in the administration of decedents’ estates.” Justice Neely adds that Mr. Chilton’s premature death was a tragedy even to his detractors and “[a]lthough this is a strange context in which to say it, ave atque vale W.E. Chilton, III.” Id.
150. Id.
151. Id.
obligation of a retraction was not met by the Gazette because it neither offered an apology nor attempted to make amends "even when it became abundantly clear to all concerned that a serious injustice had been done."\(^\text{152}\) Consequently, the paper is not entitled to "special treatment not accorded to automobile, step-ladder and lawn mower manufacturers" in the evaluation of punitive damages.\(^\text{153}\)

The final portion of the opinion\(^\text{154}\) is devoted to a review of the law categorizing plaintiffs in a defamation case.\(^\text{155}\) The majority fore-shadowed in Part I of the opinion that Mr. Hinerman is not a public official, and offers this section as clarification, "[a]lthough resolution of this issue is not necessary for decision in this appeal," in case a retrial becomes necessary.\(^\text{156}\)

First, Mr. Hinerman's status is evaluated using the following categories: "(1) public officials and candidates for public office; (2) public figures; and, (3) private individuals."\(^\text{157}\) "Public officials" are further defined as publicly elected officials,\(^\text{158}\) or "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of gov-

\(^{152}\) Id. at 580 (emphasis omitted). A note indicates that the entire matter would probably have been settled had a prompt retraction been made. Id. at 580 n.32. Furthermore, because the jury found that the actual malice standard requiring subjective appreciation of falsity or recklessness was met in this case, even if the Gazette believed that the editorial was privileged and, thus, not actionable, "what conceivable motive other than surpassing ego and unbridled arrogance could have prevented the Gazette from making amends through a prompt, prominent and abject apology? In the long run, law and morality are not separate spheres." Id. at 579 n.30.

\(^{153}\) Id. at 581 (emphasis omitted). In fact, the opinion adds that the Gazette not only refused to apologize, but "[i]f anything, the follow-up editorial quoted earlier that allegedly gave the matter 'another look' actually added insult to injury." Id. at 580.

\(^{154}\) Part V of the opinion dealt primarily with the Gazette's assignments of error dealing with jury instructions and other procedural issues. Justice Neely found each to be without merit.

\(^{155}\) Id. at 582. This is an issue because the plaintiff in this case cross-assigns error to the circuit court's determination that Mr. Hinerman is a "public official." Id.

\(^{156}\) Id. at 582. The question of a retrial is now moot, since petition for writ of certiorari was denied, 113 S. Ct. 1384 (1993).

\(^{157}\) Id. at 582-83 (citing Gertz v. Welsh, 418 U.S. 254 (1974)).

\(^{158}\) Id. at 583 (citing Long v. Egnor, 346 S.E.2d 778 (W. Va. 1986)).
ernment affairs." Under the first test, none of the three positions held by Mr. Hinerman are publicly elected posts. Likewise, Mr. Hinerman’s positions fail the “substantial responsibility or control” test. Although the Gazette argued that as a member of the Board of Governors of the West Virginia State Bar Mr. Hinerman did meet this criterion, the court finds that the Board merely advises the Supreme Court. As a second vice-president of an advisory board Hinerman did not exert substantial responsibility or control over governmental affairs. Further, even if Mr. Hinerman were a public official, he would not have been treated as such in this case because the Gazette editorial failed to identify him as a public official. Citing a Second Circuit case and other persuasive support, the majority explains that in order to raise the public official doctrine of actual malice, a media defendant must identify a low-level government official in his public capacity. Applying this rule to the case at hand, then, Mr. Hinerman is treated as a private individual rather than a public official because the Gazette identified him only as a lawyer and a UMWA attorney. In the event of a retrial, therefore, the private individual negligence standard would apply, rather than the actual malice standard which applies to public officials.

159. Id. at 582 (quoting Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)).
160. Mr. Hinerman held three positions pointed to by the Gazette as indicative of “public official” status: he was (1) appointed municipal judge, (2) appointed member of the racing commission, and, (3) elected to the Board of Governors of the West Virginia State Bar. Only the latter was an elected position, and this post fails to meet the additional requirement of being elected by the public, because lawyers, not the public, elected him. Id. at 582-83.
161. Id. at 583. As support for this position, Neely points to Gertz v. Welsh, 418 U.S. 254 (where the court failed to find a lawyer and member of the National Lawyer’s Guild to be a public official) and Lawrence v. Moss, 639 F.2d 634 (10th Cir.), cert. denied, 451 U.S. 1031 (1981) (where the court failed to find public figure status although the individual had served on Vice-President Agnew’s staff, was a deputy director of administration on the President’s reelection committee, and was a “special assistant to the Assistant Administrator of the General Services Administration”). Id.
162. Id. at 583.
163. Id. at 583-84.
164. Id. at 583. It is not necessary, however, “to identify a president, governor, U.S. senator, congressman, or other well-known public official as serving in a particular office.” Id.
165. Id. at 584.
B. The Dissent: A “Badly Bothched” Case

Justice Miller’s dissenting opinion, joined by Justice Brotherton, concludes that as a matter of law the plaintiff failed to prove the falsity of the Gazette editorial because the editorial was an accurate report of official proceedings.\(^\text{166}\) In addition, the colorful opinion attacks Justice Neely’s majority opinion with vigor:

In my more than thirty-five years as a trial lawyer and as a Judge on this Court, I have never seen a major case so badly botched. It contains a virtual Augean stables’ worth of error and surplusage . . . .\(^\text{167}\)

I cannot help but note the majority’s wolf-in-sheep’s-clothing patronizing of the press. It assures the Gazette of its high regard, while simultaneously battering the paper with various low blows supplied by the most implacable media critics. Were it not for judicial immunity, I suspect the Gazette would have a good libel suit against the majority . . . .\(^\text{168}\)

It is unfortunate that the majority is unwilling to faithfully apply First Amendment law, sworn as we are as judges to uphold the Constitution of the United States.\(^\text{169}\)

Miller explains that the majority opinion: (1) fails to compare the original and unchallenged Gazette article with the editorial to determine “substantial inaccuracy”; (2) fails to address the controlling issue of whether or not the Gazette was privileged against the libel suit because of the right of the press to fairly and accurately report official proceedings; (3) “must manufacture legal authority to reach its stunning conclusion that the current United States Supreme Court has a diminished interest in media libel cases”; and, (4) errs in its evaluation of the role of a retraction in a libel case.\(^\text{170}\)

\(^{166}\) Id. at 594 (Miller, J. dissenting).

\(^{167}\) Id. at 583 (quoting BULFINCH’S MYTHOLOGY 118 (Modern Library Edition) (referring to Hercules’ task of cleaning the King’s three thousand oxen’s stalls, which had not been cleaned for thirty years)). This is the first of Justice Miller’s literary allusions in the opinion, perhaps mocking the majority writer’s penchant for quoting classical literature in his own opinions.

\(^{168}\) Id. at 585.

\(^{169}\) Id. at 596.

\(^{170}\) Id. at 584-85.
Miller turns first to the facts of the case and determines that the threshold requirement of falsity is not established. A Gazette article, which was not challenged as false, reported the contents of Mr. Levin's petition filed in the Supreme Court. The editorial in question was, in turn, based on that earlier article. The editorial must be evaluated, then, as to whether it accurately summarized the article upon which it was based. The allegedly libelous elements in the editorial were (1) its statement that Mr. Levin contended that "his lawyer took every penny, getting $12,000 for one day's work"; and (2) its failure to include the phrase "until the [fee] bill was paid." Nevertheless, the dissent finds the "gist or 'sting'" of the editorial accurate: Mr. Hinerman charged Mr. Levin a fee of over $12,000 for one day's work and when Mr. Levin did not properly answer the fee suit, the default judgment allowed Mr. Hinerman to seize all of Mr. Levin's benefits. Therefore, "from Levin's viewpoint, he was not receiving a single penny of his workers' compensation benefits because every penny was going to the lawyer." Although the editorial did not reveal whether the $12,000 judgment would absorb the entire award, the dissent insists that the majority unreasonably requires the journalist to make this complicated legal calculation.

The dissent reviews constitutional libel law and determines that, up until the Hinerman majority opinion, the West Virginia Supreme Court had faithfully followed the constitutional precepts which require that a plaintiff in a public official libel case must prove by clear and convincing evidence (1) that the statements were "false or misleading to the extent that the true facts would have produced a 'different effect on the mind of the reader' because 'minor inaccuracies do not amount to falsity so long as 'the gist, the sting, of the libelous charge be justified;';" (2) that the statement defamed the

171. Id. The May 18, 1983 article is set out in its entirety by Justice Miller. However, he maintains that the majority refuses to do this because "the article demonstrates the substantial accuracy of the editorial." Id. at 586 n.8.
172. Id.
173. Id. at 586-88.
174. Id.
175. Id. at 587-90.
176. Id. at 590 (quoting Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419
plaintiff; (3) that the statements were published with knowledge of falsity or with reckless and willful disregard of the truth; and, (4) that "the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material."\(^\text{177}\) Furthermore, knowledge of falsity or recklessness must be determined at the time of publication.\(^\text{178}\) Therefore, the dissent suggests that the majority inaccurately imputes actual malice to Mr. Haught at the time of publication by using evidence\(^\text{179}\) that occurred only after the publication of the editorial.\(^\text{180}\) Further, the majority inaccurately supports the same proposition with evidence that Mr. Chilton had a bias against lawyers. Justice Miller contends that this evidence is equally not supportive because "ill will is not equivalent to actual malice [and] ‘should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.’"\(^\text{181}\)

The dissent further asserts that the majority misinterprets the privilege to fairly and accurately report official proceedings, and objects to the mere three paragraphs the majority opinion devotes to this essential issue.\(^\text{182}\) The right of the press to report with impunity any public proceeding has been consistently upheld nationally,\(^\text{183}\) and was embraced most recently by the West Virginia Supreme Court in \textit{Dixon v. Ogden Newspapers}.\(^\text{184}\) The dissent contends that the majority ignores

\(^{177}\) \textit{Id.} at 590 (citing \textit{Dixon}, 416 S.E.2d at 238).
\(^{178}\) \textit{Id.}
\(^{179}\) The dissent refers to the majority’s use of the evidence of Mr. Haught’s telephone conversations with Mr. Hinerman’s associates. \textit{Id.} at 567-70 nn.2-16.
\(^{180}\) \textit{Id.} at 590.
\(^{182}\) \textit{Id.} at 590 & n.14. The dissent further criticizes the majority for overlooking all First Amendment cases, and instead citing only the \textit{RESTATEMENT (SECOND) OF TORTS}. In another literary allusion, Justice Miller advises:

In this unbridled ignorance, the majority writer, a devotee of Tennyson’s Idylls of the King, “Merlin and Vivian,” might take heed of this thought from the same work by Tennyson: ‘Blind and naked ignorance delivers brawling judgments unashamed, on all things all day long.’

\textit{Id.} at 590.
\(^{183}\) \textit{Id.} at 590-92.
\(^{184}\) \textit{Id.} at 592 (citing \textit{Dixon v. Ogden Newspapers}, Inc., 416 S.E.2d 237 (W. Va. 1991)).
Dixon, where the court unanimously found that a newspaper article, reporting from a trial that police officers may have leaked confidential information about a police raid, was substantially accurate and, therefore, not libelous.\textsuperscript{185} Applying this law to the case at hand, the dissent argues that the original \textit{Gazette} news article was a fair and accurate rendition of the Levin petition to the Supreme Court, and the editorial’s only omission was that the attachment would continue “‘only until the [fee] bill was paid.’” Without the phrase, the editorial is substantially accurate because Mr. Levin would not receive any money until the lawyer was paid. There was no way for a reporter or editorial writer to evaluate if the award would even be large enough to cover the bill because only one well-versed in the law could make such an evaluation. More importantly, the dissent points to the fact that “the real harm was that the attachment took all of Mr. Levin’s source of funds. He was impoverished and without any income.”\textsuperscript{186} Omitting “until the fee was paid,” then, was not a material omission with defamatory implication. In fact, the addition of the phrase would add nothing because it is a matter of common understanding that one could not collect more than the amount owed. The \textit{Gazette}’s editorial, therefore, was substantially accurate when viewed in reference to the privilege to report official proceedings.\textsuperscript{187}

Further, the dissent rejects the majority’s analysis of First Amendment cases, and specifically, the “dubious assertion that the current membership of the United States Supreme Court has a ‘waning enthusiasm for reviewing liable [sic] judgments against media defendants.’”\textsuperscript{188} The list of twenty denials for certiorari in libel cases demonstrates “the shallowness of the majority’s research,” considering only one of the cases listed had involved a monetary judgment against a media defendant.\textsuperscript{189} The dissent points to recent cases as contradictory of the majority’s retreat theory.\textsuperscript{190} The majority, in fact, rests its

\textsuperscript{185} Id. at 592.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 592-93 (citing Hinerman, 423 S.E.2d at 592).
\textsuperscript{189} Id. at 592-3 & nn.16-17.
\textsuperscript{190} Id. at 592-93 (citing Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Masson v. New Yorker
conclusion on such impermissible standards as the *Gazette's* supposed duty to call Mr. Hinerman in advance of publishing the editorial, and disregards the high court's latest statement that minor inaccuracies that do not alter the thrust of asserted libel do not amount to falsity. Had the majority heeded these precepts, Justice Miller concludes, the *Gazette* editorial would have properly been found not libelous because there was no proof of falsity in light of the fair and accurate reporting privilege.

The dissent also objects to the majority's suggestion that the failure of the *Gazette* to offer a retraction is conclusive proof of actual malice because this suggestion is contrary to the general rule that actual malice is determined at the time of publication. Although some cases have held that the failure to retract may be used as evidence on the issue of actual malice, *New York Times* established that failure to retract, in and of itself, is insufficient to establish actual malice. Such a failure may, in fact, represent the publisher's good faith belief that no defamation had occurred. A prompt retraction may, however, be used as evidence of a lack of actual malice and

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Magazine, Inc., 111 S. Ct. 2419 (1991)).

191. *Hinerman*, 423 S.E.2d at 593 (Miller, J. dissenting). Miller stresses the following language: "[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Id.* (citing Harte-Hanks, 491 U.S. at 688 (1989)).

192. *Id.* at 594 (citing Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419 (1991)).

193. *Id.* at 594.

194. *Id.* at 594-95 (citations omitted).


196. *Id.* at 594 (citing *New York Times*, 376 U.S. at 586).

197. *Id.* at 594-95. This statement may be in response to Justice Neely's query in footnote 30 of the majority opinion: "Assuming that the *Gazette* believed that its statements were privileged and thus not actionable in a court of law, what conceivable motive other than surpassing ego and unbridled arrogance could have prevented . . . a prompt, prominent, abject apology?" *Id.* at 579 n.30.

may also be used to mitigate damages.\textsuperscript{199} In fact, Justice Miller contends that a good faith retraction should totally "insulate a media defendant from a punitive damage award."\textsuperscript{200}

The dissent further criticizes the majority's obiter dictum conclusion that Mr. Hinerman was a private, rather than public person. However, even assuming this to be true, Mr. Hinerman would still fail in his libel action because he failed to prove falsity.\textsuperscript{201} According to Miller, then, because no such falsity has been proven, even under the negligence standard applied to private citizens, Hinerman's judgment cannot be sustained.

In conclusion, the dissent invites United States Supreme Court review of this case because it exposes West Virginia's media to the majority's "pernicious reasoning."\textsuperscript{202} In a final literary allusion, he warns the West Virginia press: "Never send to know for whom the bell tolls; it tolls for thee."\textsuperscript{203}

V. ANALYSIS

The United States Supreme Court denied the Gazette's petition for writ of certiorari,\textsuperscript{204} which leaves us with the prospect of evaluating the current state of West Virginia's media libel law in light of the Hinerman opinion.

At first blush, it is obvious that the Hinerman majority offers substantial rhetorical ammunition to West Virginia plaintiffs in future media libel cases. What self-respecting plaintiff's attorney would forego the opportunity to reiterate Justice Neely's words to argue that it was only because of "surpassing ego and unbridled ignorance" that a

\begin{itemize}
\item \textsuperscript{199} \textit{Id.} (citing W. Va. Code § 57-2-4 (1923) (providing that an apology is evidence in mitigating damages)).
\item \textsuperscript{200} \textit{Id.} at 595.
\item \textsuperscript{201} \textit{Id.} at 595 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (requiring that a private person prove falsity, as well as fault); and \textit{Milkovich}, 110 S. Ct. at 2704)).
\item \textsuperscript{202} \textit{Id.} at 596.
\item \textsuperscript{203} \textit{Id.} at 596 (quoting \textit{JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS Mediation XVII}).
\item \textsuperscript{204} 113 S. Ct. 1384.
\end{itemize}
media defendant had refused the plaintiff a retraction?\textsuperscript{205} Likewise, the policy of deterring "arrogant, abusive, and irresponsible media companies" will be stressed by plaintiffs in future libel litigation.\textsuperscript{206}

Substantively, several aspects of the majority's holding in \textit{Hinerman} are likely to effect the libel law of this state as well. The majority interprets a "less stringent" \textit{New York Times} appellate review standard,\textsuperscript{207} a "waning enthusiasm" on the part of the United States Supreme Court to review libel judgments,\textsuperscript{208} and narrowly drawn Supreme Court libel holdings\textsuperscript{209} as indicative of an anti-irresponsible media policy on the part of the Court. The majority reasons that this policy supports the necessity of the \textit{Hinerman} pro-victim approach.

However, as Justice Miller convincingly asserts, the myriad of libel cases which have been denied certiorari are far from proof that the United States Supreme Court has lost enthusiasm for libel issues.\textsuperscript{210} In fact, it is inappropriate to interpret the denial of a writ as any indication of policy considering the volume of petitions the Supreme Court receives each year in comparison to the number of cases the Supreme Court can realistically hear. Likewise, the Supreme Court has admonished that such a denial "imports no expression upon the merits of the case."\textsuperscript{211}

Furthermore, narrow holdings in recent Supreme Court libel decisions do not necessarily indicate "an ebbing tolerance for irresponsible media behavior."\textsuperscript{212} Of the six cases cited to support this proposition, three of the holdings were in favor of the defendant,\textsuperscript{213} and three were in favor of the plaintiff.\textsuperscript{214} It would appear, therefore, that nar-
row holdings which apply equally to victorious plaintiffs and victorious defendants would not support an anti-press attitude. Rather, this would seem to reflect a concern to address only the case and controversy at issue in each case.

The majority suggests that the opinions of Chief Justice Rehnquist indicate a shift in the majority position on defamation issues. In opinions in 1984, 1985, and 1986, Justice Rehnquist dissented in defamation cases. However, in 1988 and 1990, Justice Rehnquist wrote majority defamation opinions. According to the Hinerman majority’s analysis, this shift “may signal that the majority has moved sufficiently to accommodate the concerns of at least one of the dissenters.” However, a review of these cases does not necessarily lead to that conclusion.

Of the three dissenting opinions cited, two were authored by Justice Rehnquist. In the 1984 Bose v. Consumer Union case, Rehnquist based his dissent on a procedural issue. In that case the majority held that actual malice in libel cases must be factually reevaluated by the appellate court in order to determine whether the evidence supported the conclusion reached by the lower court with convincing clarity. Justice Rehnquist’s dissent reasoned that actual malice involves a mens rea judgment. Trial courts hear and see the witnesses, know the law involved, and are more fully equipped than an appellate court, with only a bare record in front of it, to make mens rea judgments. Consequently, he advocated adopting the normal “clearly erroneous” standard of the Federal Rules of Civil Procedure. Justice Renquist’s opinion is based more on the policy of deference to the

216. Hinerman, 423 S.E.2d at 573-74 n.19.
218. Hinerman, 423 S.E.2d at 574 n.19.
219. 466 U.S. at 515.
220. Id.
221. Id.
222. Id.
factual determinations of lower courts than on a rejection of the majority's assessment of First Amendment principles.\textsuperscript{224}

Likewise, in \textit{Anderson v. Liberty Lobby}, Rehnquist dissented on similar procedural grounds. The majority held in that case that a court considering a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a libel case must apply the clear and convincing standard which is normally applied to the fact-finder in such a case. Justice Rehnquist's objection to the majority holding was that by creating a different procedural standard from that which is traditionally used, libel decisions will become less predictable.\textsuperscript{225} In offering no guidance as to how to apply this new standard, Rehnquist feared that the majority's position would lead to erratic lower court decisions on summary judgment in libel cases.\textsuperscript{226} Again, the Rehnquist dissent is not based on any First Amendment concern, but rather on a concern for procedural consistency.

Rehnquist and two other justices joined Justice Steven's substantive \textit{Philadelphia Newspapers v. Hepps} dissent.\textsuperscript{227} In \textit{Hepps}, a private figure businessman alleged he was defamed by a publication which inferred that he had used links to organized crime to influence legislative and administrative processes. The majority held that constitutionally, in a private individual/public matter case, the burden of proving falsity and fault must be borne by the plaintiff.\textsuperscript{228} The dissent urged that the majority result places too heavy a burden on victims and virtually insures their inability to disprove negligently false publications.\textsuperscript{229} Although Rehnquist joined this clearly pro-victim dissent, this case did not directly involve the \textit{New York Times} actual malice standard because no public official or figure was involved. Therefore, his opinion here is not analogous to his next libel majority opinion which did involve the actual malice standard.\textsuperscript{230}

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\textsuperscript{224} Bose, 466 U.S. at 515.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} 475 U.S. at 779 (Stevens, J. dissenting).
\textsuperscript{228} Id. at 768.
\textsuperscript{229} Id. at 781-82.
\textsuperscript{230} Hustler, 485 U.S. at 46.
\end{flushright}
In fact, in *Hustler Magazine v. Falwell*, the Chief Justice expanded the *New York Times* standard.²³¹ The case involved an advertising parody of "first times," which depicted Jerry Falwell, a nationally-known minister and political figure, in a drunken and incestuous manner.²³² Falwell alleged, among other things,²³³ that the publication entitled him to recover for damages for the intentional infliction of emotional distress.²³⁴ The jury ruled for Falwell on this issue and awarded him $100,000 in compensatory and $50,000 in punitive damages.²³⁵ The Supreme Court, however, overturned the judgment and held that when First Amendment freedoms are implicated, the actual malice standard will apply not only to reputational injury alleged by public officials, but to intentional infliction of emotional distress as well.²³⁶ By applying the *New York Times* standard to a tort, the Supreme Court showed a willingness to expand, rather than limit, the doctrine.

The *Hinerman* majority finds it ironic that in *Hustler* Rehnquist quotes from the *Bose* majority opinion, from which he had dissented.²³⁷ Justice Rehnquist does, in fact, reiterate the *Bose* policy of protecting a free society by ensuring an unhampered exchange of ideas on matters of public concern.²³⁸ However, as discussed earlier, Rehnquist's dissent in *Bose* was based on a procedural matter, and his reiteration in *Hustler* of the policies espoused by the *Bose* majority would seem to affirm a commitment to the *New York Times* doctrine, rather than signal that the majority has shifted to accommodate earlier libel dissenters, as the *Hinerman* majority opinion suggests.²³⁹

²³¹ *Id.* at 47.
²³² *Id.* at 47-48.
²³³ Falwell sued for libel and invasion of privacy as well. The jury found that no libel had occurred because the advertisement could not "reasonably be understood as describing actual facts . . . or actual events in which [he] participated." The United States Supreme Court agreed. *Id.* at 46. The District Court directed a verdict against Falwell on the invasion of privacy claim. *Id.*
²³⁴ *Id.* at 46.
²³⁵ *Id.*
²³⁶ *Id.*
²³⁷ *Hinerman*, 423 S.E.2d at 573-74 n.19.
²³⁸ *Hustler*, 485 U.S. at 50-51.
²³⁹ See *Hinerman*, 423 S.E.2d at 774 n.19.
Justice Rehnquist's most recent libel majority opinion, *Milkovich v. Lorain Journal*, concerned a private individual and held that no additional constitutional privilege for "opinion" need be established in light of the protection already afforded freedom of expression by the First Amendment.240 His opinion did recognize society's important interest in protecting individual reputation.241 However, the decision may reflect an unwillingness to further constitutionalize libel law. Justice Rehnquist's *Bose* and *Anderson* dissents show the Justice's concern that libel cases now present procedurally complicated matters for trial courts, possibly resulting in erratic decisions. Adding further constitutional requirements to an already procedurally complicated issue would undoubtedly add to the confusion.

Justice Neely's hypothesis, therefore, that recent Supreme Court libel decisions approving of *New York Times v. Sullivan* are "mere genuflections as each year the Court moves farther away" from *New York Times* principles242 appears to be ill-founded. As illustrated, the United States Supreme Court appears ready to protect the First Amendment freedoms of expression with a vigor at least equal to that which it had in 1964 when *New York Times* was decided. Regardless, the West Virginia Supreme Court majority in *Hinerman* has formally adopted the idea that the United States Supreme Court now has less enthusiasm for protecting the First Amendment guarantees afforded the press. The obvious implication of this policy is that media defendants who find themselves in front of the state's high court are likely to encounter a more hostile environment than that of the past.

Part VI of the *Hinerman* majority, dealing with the public/private figure doctrine,243 reveals that the Court is more likely to find a border-line case in favor of plaintiffs. This is consistent with the pro-victim policy which underlies the majority opinion. Mr. Hinerman held three positions: (1) municipal judge; (2) member of the West Virginia Racing Commission; and (3) West Virginia State Bar Vice-Presi-

241. Id. at 13-18.
243. Id. at 582-84.
dent. The majority found that none of these positions qualified Mr. Hinerman as a public official, and even if the positions alone had qualified, because he was not identified in that position in the editorial, the public official doctrine did not apply in this case. By applying this latter requirement which comes from persuasive authority, the Court has shown its hesitance to apply the public official doctrine in close cases.

This being the case, West Virginia media defendants must take several precautions. First, any public employee, low-level governmental or quasi-governmental official who is not publicly elected should be identified in that position. If not, the plaintiff will argue that under Hinerman, by definition, he is not a public official, and must meet only a burden of proving negligence in the publication of a defamatory falsity, rather than the stiffer burden of actual malice. Secondly, even if the plaintiff is identified in that position, unless he or she clearly has "substantial responsibility for or control over the conduct of governmental affairs" the Court is unlikely to find public official status. Consequently, the media defendant in West Virginia can anticipate less favorable treatment in the determination of public official status than can the plaintiff.

A final major disagreement in the Hinerman opinions appears to rest on the predicate issue of substantial falsity, and the proper standard of review to be applied to falsity. Both camps agree that a reviewing court is required to independently evaluate the facts of a libel case and determine whether the jury's verdict was correct and liability was properly imposed. However, the disagreement involves the method of that review.

244. Id. at 582-83.
245. Id. at 583.
246. Id. (citing Bufalino v. Associated Press, 692 F.2d 266, 273 (2d Cir. 1982), cert. denied, 462 U.S. 1111 (1983)).
247. Id. at 583.
248. Id.
249. Id. (citing Gertz, 418 U.S. at 335 n.6 (citing Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)).
The majority asserts that in determining whether the constitutional actual malice standard has been met, the entire factual record should be evaluated under the clearly erroneous standard. The dissent urges that before reaching the actual malice question, the entire record must be evaluated, in light of the privileges asserted, to determine if falsity exists. The dissent in this case found no clear and convincing evidence of falsity, and under its criterion of review, the case fails the threshold question in an independent evaluation. The Gazette’s Petition For Writ of Certiorari to the United States Supreme Court complained that the Hinerman majority has indicated its belief that it is not required to conduct an independent evaluation of the substantial falsity issue in defamation cases by accepting the Hinerman jury’s determination of falsity without substantial analysis. Courts are split on the standard of appellate review of falsity, and the Supreme Court has not yet clarified the matter.

Underlying the court’s disagreement about appellate review is the issue of ensuring that a jury has fully appreciated the significance of First Amendment protection in rendering their verdict. Certainly, sympathetic juries may err at any step of the complicated process which has become the complex current state of the defamation trial. One U.S. District Judge provided a strategy to be employed at the trial level to ensure less jury confusion. In the 1984 Sharon v. Time Magazine case, the jury was asked to consider the three issues of defamation, falsity, and actual malice separately. The jury found first that the publication was, in fact, defamatory. Then, it found that it was, likewise, false. However, on the last issue the jury found that the plaintiff had not shown that the defendant had published the article

250. *Id.* at 561.
251. *Id.* at 587-92 (Miller, J. dissenting).
254. *Id.* at 29.
255. *Id.*
256. *Id.*
with actual malice. Such a strategy seems eminently sensible. The process is simplified for the jury and a defamed public official may have the moral satisfaction of favorable defamation and falsity verdicts, even if he is unable to prove actual malice on the part of the media. Likewise, the media defendant would probably be less likely to have large adverse verdicts. A sympathetic jury could vindicate a plaintiff, at least on the falsity and defamation issues, without finding actual malice. Therefore, the jury may be more receptive to defense arguments on the chilling effect of large plaintiff awards in close actual malice cases. The effect, then, would be a win-win situation for morally vindicated plaintiffs and defendants who are not monetarily injured. The obvious procedural advantage is that a local jury is less likely to be influenced by their feelings and more able to apply the law and constitutional safeguards effectively.

In the absence of such a universal procedure, however, it appears logically necessary for appellate courts to scrutinize each level of a defamation case independently, using the convincing clarity standard. However, the United States Supreme Court has specifically declined to give guidance on the matter, and the West Virginia Supreme Court does not appear anxious to reevaluate the evidence of falsity in detail to "assure that the judgment does not constitute a forbidden intrusion on the field of free expression." Consequently, future West Virginia media defendants are likely to have few verdicts overturned at the state appellate level on the threshold falsity issue.

VI. CONCLUSION

As a practical matter, the essential lesson of Hinerman is that media defendants will be less sheltered in West Virginia courts than they have been in the past. The clear message is that the First Amendment protection upon which they have steadfastly relied may not be enough to escape future libel verdicts. The majority writer minces no
words in his disdain of media arrogance and his willingness to protect libel victims. Whether the decision will have an actual chilling effect on West Virginia’s media remains to be seen. One might predict that lawyers will advise their media defendants to be vigilant in policing their ranks, to take no chances if the facts are not crystal clear, and to try to avoid potential punitive damages by offering timely, unequivocal retractions.

The media may, however, take solace in the fact that *Hinerman* was essentially a two-to-two decision by the current court, because Justice McHugh did not participate in the decision.\(^{261}\) Depending on that Justice’s proclivity, the next media defendant before the West Virginia Supreme Court may meet with a more sympathetic judicial environment.

*Carole Lewis Bloom*

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261. Senior Justice Caplan joined Justices Neely and Workman to form the majority. See *supra* note 90.