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The Development of Modern Libel Law: A Philosophic Analysis

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THE DEVELOPMENT OF MODERN LIBEL LAW: A PHILOSOPHIC ANALYSIS

I. INTRODUCTION

Jean Jacques Rousseau commented in *The Social Contract,* "In the strict sense of the term, a true democracy has never existed and never will exist."[1] That a human being, upon entering the "social contract" should sacrifice some of his freedom so that others may enjoy theirs is a principle of democratic government so true it is almost devoid of significance. Surfeit freedom inevitably reduces itself to the most pernicious brand of chaos; and in chaos, no organized society can long exist. Edmund Burke once stated, "But what is liberty without wisdom, and without virtue? It is the greatest of all possible evils; for it is folly, vice and madness, without tuition or restraint."[2] Mark Twain, more humorously, but just as succinctly, quipped, "It is by the goodness of God that in our country we have those three unspeakable precious things: freedom of speech, freedom of conscience and the prudence never to practice either."[3] Justice Oliver Wendell Holmes exemplified the Burkian spirit of freedom, but freedom supported by an inherent sense of restraint and wisdom when, in his decision in *Schenck v. United States,*[4] he stated that, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[5]

One of the inherent philosophic and pragmatic problems in a democratic form of government is reconciling the tension between order and freedom. Such a problem does not exist in oligarchies or dictatorships; for in such governments, order is synonymous with freedom. Thus, responsibility is imposed from above. Yet, democracies entertain, by their very spiritual foundation, an essential belief in the fundamental goodness of mankind. Men will usually act responsibly, so the argument goes, if they are allowed to be free. Thus, responsibility will arise from within the body politic if people are allowed to be free to govern themselves. Few would argue that these are not idealistic and noble philosophic sentiments. Human experience reveals, however, that not all free people will act responsibly.

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1. FAMILIAR QUOTATIONS, 358 (J. Bartlett ed. 1980).
2. L. COPELAND, POPULAR QUOTATIONS, 269 (1961).
3. B. EVANS, DICTIONARY OF QUOTATIONS, 252 (1978).
4. 249 U.S. 47 (1919).
5. *Id.* at 52.

Government is necessary in order for society to exist. Freedom must be guarded by the restraints of law. A fundamental philosophic issue is, therefore, how much "law" is just for the responsible exercise of freedom and how much law is merely tyranny disguised as justice in the name of order. Nowhere is this essential philosophic and pragmatic problem of democratic government better illustrated than in the tension between the first amendment and libel law.[6]

Benjamin Franklin, the first great American printer, defended libel laws when he said,

> Few of us, I believe, have distinct ideas of its [freedom of press] nature and extent. . . . If it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my share of it when our Legislature shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of abusing others for the privilege of not being abus'd myself.[7]

Few of the early founding fathers entertained such sentiments, however, and the freedom of press was included in the first amendment to the Constitution. Yet, the common law tort of libel continued to exist. Clinton Lawthorne, in his book *Defamation and Public Officials*,[8] comments that:

> Through the years, journalists in the United States have been plagued with uncertainty as to what they could, or should, write about public officials and candidates for public office. In considering what to write, they have been forced, since the dawn of this nation, to balance their ideas as to what the public should know against their ideas as to what the libel laws would allow them to report. Such balancing has not always been easy because of the difficulty in knowing what constitutes libel, especially in commenting about public officials and public figures. Though every state has its libel laws—either statutory or common—these laws have been largely what the judges have said they were. And the judges from state to state and from year to year have greatly varied their rulings. In short, a patchwork of libel laws grew up from jurisdiction to jurisdiction, with some overall standardization but without national uniformity.
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> Differences prevailed until 1964, when the United States Supreme Court in the case of *New York Times v. Sullivan* issued a broad mandate that established a uniform standard for libel as it pertains to public officials.[9]

6. A. HANSON, LIBEL AND RELATED TORTS, 20, (1969).
7. *Id.* at 11.
8. C. LAWTHORNE, DEFAMATION AND PUBLIC OFFICIALS, XIII (1971).
9. *Id.*, p. XIII.

Bose Corporation v. Consumers Union of United States[10] is the latest United States Supreme Court case concerning libel. Decided in the tradition of *New York Times Co. v. Sullivan,*[11] *Bose* held that an appellate court's review of the district court's "actual malice" determination is not limited to the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a).[12] The Court reiterated its *New York Times* rule that in all cases involving libel first amendment issues, appellate courts have a duty to examine independently the portions of the record relating to the actual malice determination to ensure that there are no constitutional violations curbing freedom of expression.[13] Consequently, an appellate court's standard of review must be faithful to both Federal Rule 52(a) and the *New York Times* rule of independent review. Additionally, the Supreme Court reaffirmed the holding in *Bose* that proof of a false statement does not establish that the defendant prepared the article with knowledge of its falsity or with reckless disregard of the truth.[14]

This Article reviews the major Supreme Court decisions leading up to *Bose*. It sets forth both the elements of libel and the standard of proof which must be met in order to establish libel. It then analyzes how the Supreme Court applied these standards to the *Bose* fact pattern and, in addition, created a new procedural/appellate review standard. It also delineates the merits of Justice Rehnquist's dissent. The analysis concludes by examining the implications of *Bose* upon New Mexico law and upon libel first amendment liberties in general.

II. A BRIEF REVIEW OF *NEW YORK TIMES* AND ITS PROGENY

A. New York Times v. Sullivan: *The Actual Malice Standard*

New York Times v. Sullivan[15] arose during the height of the civil rights protests in the South. Mr. L. B. Sullivan, a supervisor of the Montgomery, Alabama police department, filed an action against the *New York Times* for publication of an advertisement describing alleged maltreatment of Black protesters.[16] The trial court awarded Sullivan $500,000.00 against the New York Times and four other individuals named in the advertise-

10. 104 S. Ct. 1949 (1984).

11. 376 U.S. 254 (1964).

12. FED. R. CIV. P. 52(a) states that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

13. *Bose*, 104 S. Ct. at 1967 n.31. The first amendment states, in pertinent part, "Congress shall make no law . . . abriding the freedom of speech or of the press. . . ." U.S. Const. amend. I.

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

15. 376 U.S. at 256.

16. *Id.* at 256-59.

ment.[17] The Supreme Court of Alabama affirmed the decision based upon the reasoning that the statements in the advertisement were libelous per se and false.[18] Furthermore, the court determined that the evidence established malice on the part of the newspaper. The defendant's constitutional arguments were rejected on the basis that the first amendment does not protect libelous publications.[19]

The United States Supreme Court determined that the New York Times' advertisement was not substantially correct and noted that the Times, at the demand of the Governor of Alabama, had retracted the advertisement.[20] Nevertheless, the Court stated that criticism of a public official's conduct does not lose its constitutional protection merely because it was effective criticism and hence diminished his official reputation.[21]

After finding that an independent review of the whole record was constitutionally mandated, the Court held that evidence showing that the New York Times published the advertisement without checking its accuracy did not establish that the paper "knew" the advertisement was false.[22] At most, all the evidence established only that the New York Times was negligent in its failure to discover the misstatements.[23] Responding to first amendment policy considerations, the Court developed a "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves 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."[24] The plaintiff must establish actual malice with clear and convincing evidence.

B. Extension of the Actual Malice Standard to Public Figures

In *Curtis Publishing Company v. Butts*,[25] the Supreme Court extended the *New York Times* actual malice standard to actions initiated by "public figures" as well as public officials. *Curtis* involved a defamation suit against the Curtis Publishing Company by Wally Butts, the athletic director of the University of Georgia. The Curtis Publishing Company accused Butts of conspiring to "fix" a football game between the Uni-

17. *Id.* at 256.
18. *Id.* at 263.
19. *Id.* at 264.
20. *Id.* at 286.
21. *Id.* at 273.
22. *Id.* at 285, 287.
23. *Id.* at 288.
24. *Id.* at 279-80.
25. 388 U.S. 130 (1937).

versity of Georgia and the University of Alabama.[26] The United States Supreme Court held that anyone in the public eye who sought to prevail upon a defamation claim must meet the actual malice standard set forth in *New York Times*.[27]

C. *The Limits of the Actual Malice Standard*

Gertz v. Robert Welch, Inc.[28] case is significant because it defined the outer perimeters of *New York Times*. This case involved a Chicago policeman, Nuccio, who was convicted of murder. The victim's family retained Elmer Gertz to represent them in civil litigation against Nuccio.[29]

Robert Welch, Inc. published *American Opinion,* a monthly periodical sympathetic to the views of the John Birch Society. In March of 1969, Robert Welch, Inc. published an article alleging that Nuccio's murder trial was part of a communist campaign against the police and that Gertz was the architect of the "frame up" against Nuccio.[30] The article labeled Gertz a "Leninist" and "Communist-fronter."[31] It also stated that Gertz had been an officer of the National Lawyers Guild, described as a communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."[32] Gertz sued for defamation.

The district court held that the *New York Times'* actual malice standard applies to all public issues, regardless of whether the person defamed is a public official or figure. Thus, although the trial court found that Gertz was not a public figure, it applied the actual malice standard to Gertz.[33] The court of appeals affirmed. The Supreme Court reversed, holding that a publisher or broadcaster of alleged defamatory falsehoods may not raise the *New York Times'* standard of actual malice against an individual who is neither a public figure nor a public official.[34] Moreover, "[s]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[35]

As a result of *New York Times v. Sullivan, Curtis Publishing Co. v. Butts,* and *Gertz v. Robert Welch, Inc.*, a threshold question determines

26. *Id.*
27. *Id.* at 155.
28. 418 U.S. 323 (1974) (5-4 decision).
29. *Id.* at 325.
30. *Id.* at 325-26.
31. *Id.*
32. *Id.*
33. *Id.* at 323.
34. *Id.* at 339-48.
35. *Id.* at 347.

the steps that must be taken in resolving defamation actions. The threshold question is whether the plaintiff is or is not a public figure or official. If he is not a public figure or official, he is deemed to be a private individual, and it is left to the state to define its own standard of liability. For instance, proof of mere negligence satisfies the defamation requirements against private individuals in New Mexico.[36] If, however, the plaintiff is deemed to be a public figure or official, the *New York Times'* actual malice standard applies.

III. THE *BOSE* DECISION

Bose Corporation (Bose), a manufacturer of stereo speakers, filed a defamation action against Consumers Union of United States, Inc., a consumer product testing organization, for product disparagement arising out of the organization's published review of Bose 901 speakers.[37] The review, while admitting that the Bose 901 speakers were "unique and unconventional," concluded by saying,

> [I]ndividual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.[38]

The Consumers Union's test actually revealed, however, that there was sound movement back and forth along the wall in front of and between the two speakers, as they were, indeed, designed to perform.[39] The Con-

36. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982).

37. The details of this case are rather involved. Consumers Union of U.S., Inc. issues a magazine called *Consumer Reports*. In its May 1970 issue, Consumers Union published a seven-page article evaluating stereo speakers. Included in this evaluation were Bose speakers. The article, while stating that the Bose speakers were "unique and unconventional," was overall very negative in its evaluation. *Bose Corp. v. Consumers Union of United States*, 508 F.Supp. 1249, 1273 (D.C. Mass. 1981).

Bose Corporation took exception to numerous statements made in the article and when Consumers Union refused to publish a retraction, Bose Corporation commenced their product disparagement action in the United States District Court for the District of Massachusetts. Bose Corporation attacked the article on a number of points. First, they alleged the article was deliberately misleading in that it referred to two persons as a "panel," thus creating the impression that the Consumers Union's evaluations were objective rather than subjective. The district court agreed with Bose on this point, but ruled that it did not entitle it to relief. Secondly, the district court rejected Bose Corporation's contentions that the sound quality of the 901 speakers should have been rated higher because evaluation of a speaker's sound quality is subjective and is "nothing more than an opinion and, as such, it cannot be proved to be true or false." Finally, the court rejected Bose Corporation's arguments that Arnold Seligson, the person primarily responsible for the article, based his article upon his financial interest in marketing a competing speaker system upon which he had obtained a patent.

Nevertheless, the court agreed with Bose concerning the implications of the contested "about the room" statement in the article.

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

39. *Id.* at 1954.

sumers Union's test produced no evidence to sustain the statement that the instruments "wandered about the room."[40] Bose Corporation contended that the "about the room" description was false, misleading, and libelous since the sound heard during the Consumer Union's test actually moved "along the wall" and did not "wander about the room." Because sound movement is an important factor in evaluating the performance of stereo speakers, Bose Corporation felt the "about the room" statement connotated deliberate product disparagement in reckless disregard of the truth.[41]

Arnold Seligson, an engineer employed by Consumers Union to review the Bose 901 speakers, testified that his statement "about the room" was intended to mean "along the wall." The district court held, however, that the average reader would interpret "about" according to its plain, ordinary meaning.[42] There was testimony indicating that Seligson was an intelligent man and understood the English language and the inaccuracy of his statement. In a bench trial, the district court judge determined that Bose Corporation was a public figure, applied the actual malice standard, and entered judgment in favor of Bose.[43] Consumers Union appealed.

The First Circuit Court of Appeals, after conducting an independent review of the facts, reversed the district court ruling, stating that there was not clear and convincing evidence that the Consumers Union article was published with intentional or reckless disregard for the truth.[44] Consequently, Consumers Union could not be held liable.[45] Bose petitioned for and received a writ of certiorari from the United States Supreme Court, arguing that the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) prescribed the standard of review applicable in reviewing a determination of actual malice.[46]

The Supreme Court considered one issue: whether the court of appeals erred in its refusal to apply the clearly erroneous standard of rule 52(a) to the district court's finding of actual malice. Yet, in order to put the issue into "focus," the court found it necessary to examine in detail (1) the evidence underlying on the issue of actual malice; and (2) the reasoning underlying the district court's determination.[47]

Bose did not appeal the district court's ruling that Bose Corporation was a "public figure" as that term is defined in *Gertz v. Robert Welch,*

40. *Id.* at 1954-55.
41. *Id.* at 1952-53.
42. *Id.* at 1957.
43. *Id.* at 1954-58.
44. *Id.* at 1955.
45. *Id.*
46. *Id.*
47. *Id.* at 1967.

Inc.[48] The actual malice standard of *New York Times v. Sullivan,* therefore, was applicable. The dissent, led by Justice Rehnquist, found the district court's ruling that Bose was a "public figure" ironic:

> It is ironic in the first place that a constitutional principle which originated in *New York Times v. Sullivan,* 375 U.S. 254 (1964), because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system.[49]

Demonstrating none of Rehnquist's misgivings, the majority essentially applied the actual malice standard *de novo.* It focused on the allegedly defamatory statement that instruments heard through the Bose system tended to "wander about the room."[50] The district court concluded that the statement that "[i]nstruments tended to wander 'about the room'" was false.[51] Nevertheless, the Supreme Court held that the record did not contain clear and convincing evidence that the author or his employee prepared the article or the statement with actual malice.[52]

Arnold Seligson, an engineer employed by Consumers Union, prepared the written report upon which the contested article was based. Seligson testified that his statement "about the room" was intended to mean "along the wall." Yet, the district court held that an average, reasonable reader would interpret the word "about" according to its "plain ordinary meaning." The district court concluded:

> Seligson knew that the words "individual instruments . . . tended to wander about the room" did not accurately describe the effects that he and Lefkow had heard during the "special listening" test. Consequently, the Court concludes, on the basis of proof which it considers clear and convincing, that the Plaintiff had sustained its burden of proving that the Defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity.[53]

Despite the district court's reasoning that Seligson was an "intelligent person" whose knowledge of the English language could not be questioned, the Supreme Court concluded: "[t]he District Court did not identify any independent evidence that Seligson realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness at the

48. *Id.* at 1954.
49. *Id.* at 1967-68 (Rehnquist, J., dissenting).
50. *Id.* at 1965.
51. *Id.* at 1956.
52. *Id.* at 1967.
53. *Id.* at 1957-58.

time of publication."[54] The Court, therefore, affirmed the court of appeals' reversal, holding that appellate review of the actual malice standard was not limited to the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. Indeed, in all first amendment libel cases on appeal, Rule 52(a) must be augmented by an independent review.[55] It reasoned that those portions of the record which relate to the actual malice determination must be assessed by each appellate court independently because constitutional liberties protected by the actual malice standard make it imperative that judges insure that this rule is correctly applied. All other portions of the record must be assessed by the "clearly erroneous" standard.[56]

Justice Rehnquist in his dissent remarked:

> It is . . . ironic that, in the interest of protecting the First Amendment, the Court rejects the "clearly erroneous" standard of review mandated by Fed. Rule of Civ. Proc. 52(a) in favor of a "de novo" standard of review for the "constitutional facts" surrounding the "actual malice" determination. But the facts dispositive of that determination—actual knowledge or subjective reckless disregard for truth—involve no more than findings about the *mens rea of the author,* findings which appellate courts are simply ill prepared to make in any context . . .[57]

Justice Rehnquist pointed out that the court of appeals never rebutted the district court's finding that Seligson had actual knowledge of his false statement.[58] Instead, the court of appeals merely concluded that Seligson's language was imprecise and would not "support an inference of actual malice."[59] He viewed the *New York Times'* standard of independent review as emerging from the need to review jury determinations of actual malice. Juries are less likely to correctly apply constitutional law than trial judges. Juries usually render general verdicts. Juries do not leave statements for appellate courts to evaluate the jury's thoughts in applying the law. Yet, in bench trials such as *Bose,* there are written records whereby the appellate court can determine whether the constitutional law was correctly applied to the facts.[60] Consequently, Rehnquist concluded,

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54. *Id.*
55. *Id.* at 1959.
56. *Id.* at 1960, 1967 n.31.
57. *Id.* at 1968 (emphasis added). Justice Rehnquist does not define his use of "constitutional fact." What he appears to be saying, however, is that questions of fact are pure questions of fact whether they deal with first amendment liberties or not. There is, therefore, no such thing as a "constitutional fact."
58. *Id.*
59. *Id.*
60. *Id.* at 1969 n.2.

> Because it is not clear to me that the *de novo* findings of appellate courts, with only bare records before them, are likely to be any more reliable than the findings reached by trial judges, I cannot join the majority's sanctioning of factual second guessing by appellate courts.[61]

The majority's holding in the *Bose* case is flawed. It is questionable whether in sanctioning independent review of actual malice first amendment libel cases by appellate courts, the Supreme Court has further guaranteed and protected first amendment liberties as it is intended. Indeed, the opposite might prove true. Independent review is a double-edged sword. It is possible that courts of appeals will reject trial court factual decisions that protect publishers from libel suits under the actual malice standard. As Justice Rehnquist argued, trial judges are best suited to be the finders of fact. A court of appeals should, in the interest of protecting first amendment liberties, limit itself to the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure where the district court litigation was a bench trial.

IV. IMPLICATIONS OF THE *BOSE* DECISION FOR NEW MEXICO LAW

The *Bose* court made it clear that an independent review by appellate courts concerning first amendment libel issues is a constitutional requirement.[62] Consequently, New Mexico courts must follow the United States Supreme Court's decision. Yet, New Mexico libel law has its own unique characteristics and problems which will make application of *Bose* more than a mere rote exercise. New Mexico Rule of Civil Procedure 52 illustrates this problem.

The New Mexico Rules of Civil Procedure are modeled upon their Federal counterparts. Ironically, one of the few exceptions to this format is Rule 52. Unlike Federal Rule of Civil Procedure 52, which expressly deals with "findings by the court," the New Mexico Rule of Civil Procedure 52 deals with non-jury trials.[63] An examination of the New Mexico Rules of Civil Procedure establishes, moreover, that there is no other statutory equivalent of Federal Rule of Civil Procedure 52 located anywhere within the New Mexico rules. There is New Mexico case law, however, which seemingly corresponds to the Federal Rule of Civil Pro-

61. *Id.* at 1970.
62. *Id.* at 1967.
63. N.M. R. CIV. P. 52(a) states:

> (a) Waiver of trial by jury. Trial by jury may be waived by the several parties to any issue of fact in the following manner:
> first: by suffering default or by failing to appear at the trial.
> second: by written consent, in person or by attorney, filed with the clerk.
> third: by oral consent in open court, entered in the record.
> fourth: by suffering waiver as provided in Rule 38.

cedure 52. The case of *Everett v. Gilliland*,[64] held that if the New Mexico Supreme Court finds there is substantial evidence to support the findings of a trial court, it is bound by those findings. If the findings are supported by substantial evidence, they will be sustained on appeal.[65] New Mexico's "substantial evidence" rule resembles the "clearly erroneous" standard of the Federal Rules of Civil Procedure.

There are other examples. In *Coronado Credit Union v. KOAT Television, Inc.*,[66] the New Mexico Court of Appeals stated that broadcasting of defamatory materials by means of television generally constitutes libel and not slander, irrespective of whether it is read from a manuscript.[67] Arguably, therefore, New Mexico has been tempted to abolish the distinctions between libel and slander. Should this trend continue, the *Bose* rationale of independent review of actual malice would be extended to slander as well as libel cases in New Mexico where public figures or officials were involved.

Additionally, the tort of libel *per quod* complicates this analysis. Libel *per quod* includes one of the following: (1) "written words susceptible of two reasonable interpretations, one of which is defamatory and another which is innocent, or (2) publications which are not on their face defamatory, but which may become so when considered in connection with innuendos and explanatory circumstances."[68] Where a communication is open to both an innocent and a defamatory meaning, the finder of fact must determine which meaning was understood by the recipients of the communication.[69] Where, however, the defamatory character of a communication can only be shown by extrinsic facts, the New Mexico rule prior to *New York Times v. Sullivan* was to "plead and prove either: (1) that the publisher knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo or (2) special damages."[70] Whether or not the rule is still viable after *New York Times* and its progeny is debatable and subject to much confusion.[71]

64. 47 N.M. 269, 271, 141 P.2d 326, 328 (1943).

65. Entertainment Corp. of America v. Halberg, 69 N.M. 104, 105, 364 P.2d 358, 359 (1961).

66. 99 N.M. 233, 656 P.2d 896 (Ct. App. 1982).

67. *Id.* at 237, n. 1, 656 P.2d at 900, n.1.

68. Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 288, 648 P.2d 321, 327 (Ct. App. 1981).

69. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982) (overruling Reed v. Melnick, 81 N.M. 608, 471 P.2d 178 (1970)).

70. *Reed*, 81 N.M. at 610, 471 P.2d at 180.

71. In *Marchiondo*, the court of appeals suggested in dicta that the "New Mexico variation on the *per se–per quod* rule allowing pleading and proof of libel by extrinsic evidence without proof of actual damages, has probably been overtaken by the rulings of the United States Supreme Court. . . ." 98 N.M. at 289, 648 P.2d at 328. The *Marchiondo* court, naturally, was referring to New York Times v. Sullivan and its progeny.

Should the tort of libel *per quod* survive in its pre-*New York Times* form, the question remains whether the *Bose* decision establishes independent review of libel *per quod* suits.[72]

V. CONCLUSION

In an organized society, freedom cannot mean unbridled license, for a society cannot long survive in chaos. Yet, neither can freedom be intolerantly restrained in the name of morality or good sense, for then a democratic society smacks of tyranny. Somewhere between these two extremes lies the compromise solution. It has been the duty of the courts in this country to forge this compromise.

In the twenty years since *New York Times v. Sullivan* was decided, the Supreme Court has not chosen a moderate compromise course, a course between the extremes of surfeit freedom and enforced restraint. The Court has increased the freedom of the media while decreasing both public and private individuals' ability to restrain them. By mandating appellate courts to conduct an independent review of actual malice findings in bench trials and by finding that the *Bose* facts were insufficient to support actual malice, the Court reminded the lower courts that the media receives maximum freedom at the expense of public officials and figures. In accordance with the increase in liberality of the *New York Times* line of decisions, the trial court in *Bose* extended the "public figure" rationale far beyond its original scope, to a stereo speaker manufacturer. This type of extension could lead to equal protection violations. "Ordinary citizens" must only prove negligence in order to seek redress from the tort of libel. In contrast "public figures" must prove "actual malice"—a standard very difficult to prove. The laws of this nation, therefore, do not equally protect its citizens from the tort of libel. Ironically, the *New York Times* court created the actual malice standard in reaction to a city government and its officials who were abridging the rights of a certain class of people—Black Americans. Yet, in the process of rectifying this wrong, the court has implicitly created an artifical class of citizens, who, like their counterparts during the civil rights era, are being denied equal protection because of their alleged "special status." Arguably, therefore, the *New York Times/Bose* line of decisions is specious "Jim Crow" sophism at its best. "Separate but equal" has no place in American constitutionalism.

The people and press of this nation have a first amendment right to express or hold any opinion they choose. There is, however, a great

72. Libel *per se* differs from libel *per quod* in that the communication alone must hold the defamatory meaning without reference to any other facts not contained in the communication. As we have seen, libel *per quod* can be shown by reference to extrinsic facts.

difference between opinion and calumny. Opinion, where stated as opinion, is and should be protected to the utmost. False statements of fact, recklessly written, which ruin the reputation of another, cannot and must not be protected by the first amendment. As stated in *Gertz v. Robert Welch, Inc.:*

> Under the First Amendment, there is not such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust and wide open" debate on public issues.[73]

A man's right to his own good reputation is more precious than any benefit which might questionably be derived from surfeit freedom to disguise the truth. It is time the Supreme Court rerecognized this fundamental maxim. As George Bernard Shaw said, "Liberty means responsibility."[74] If we are to secure our liberties from tyrants both obvious and insidious, this principle must be respected. The Supreme Court has spent twenty years ignoring responsibility in the name of freedom. Now it is the time to protect responsibility.

The *Bose* decision, rather than protecting constitutional liberties, weakens them. The Supreme Court should reconsider the policies which have typified its decisions since *New York Times v. Sullivan* and take a more moderate path—a path which will protect freedoms through an awareness and appreciation of the responsibilities freedom entails. In this way, the moderate course will resume and our liberties will be secured for generations to come.

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73. 418 U.S. 323, 339 (1974).
74. Evans, *supra*, note 3, at 386.