

# PROTECTING THE MEDIA FROM EXCESSIVE DAMAGES: THE NINETEENTH-CENTURY ORIGINS OF REMITTITUR AND ITS MODERN APPLICATION IN *FOOD LION*

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## INTRODUCTION

Two enormous punitive damage verdicts against the press have the media running scared. In January 1997, a North Carolina jury expressed its disgust with ABC's undercover reporting by awarding Food Lion \$5.5 million.<sup>1</sup> Three months later, a Texas jury declared a *Wall Street Journal* story to be libelous and awarded a local brokerage firm a record-high \$222.7 million.<sup>2</sup> These large punitive damage awards grabbed headlines and incited the normal round of First Amendment fears. Several commentators suggested that the civil jury is out of control and in danger of striking a fatal blow against the freedom of the press.<sup>3</sup> At least one major media outlet apparently believed the commentators. In June 1998, the Gannett-owned *Cincinnati Enquirer* was so desperate to avoid litigation that it retracted a front-page investigative story about Chiquita bananas (that was probably true) and settled with the company for \$10 million.<sup>4</sup>

The concerns about punitive damages, although they have some merit, have been overstated. The most excessive damage awards against the press are often settled, thrown out of court entirely (as in the *Food Lion* and *Wall Street Journal* cases), or dramatically reduced.<sup>5</sup> In *Food Lion*, the trial judge initially reduced the punitive damages award from \$5.5 million to \$315,000 —by employing a little-known, nineteenth-century procedural device called remittitur.<sup>6</sup>

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1. See Howard Kurtz & Sue Anne Pressley, *Jury Finds Against ABC for \$5.5 Million*, WASH. POST, Jan. 23, 1997, at A1.

2. See Iver Peterson, *Firm Awarded \$222.7 Million in a Libel Suit vs. Dow Jones*, N.Y. TIMES, Mar. 21, 1997, at D1.

3. See, e.g., Floyd Abrams, 'Food Lion' Endangers Muckrakers, NAT'L L.J., Feb. 17, 1997, at A15 (defending his client, ABC); Sidney Zion, *A Blow Against First Amendment, Jury System*, HOUS. CHRON., Jan. 31, 1997, at A35 ("it's curtains for the First Amendment. And maybe for the jury system, too . . .").

4. See Mike Gallagher & Cameron McWhirter, *Chiquita Secrets Revealed; Enquirer Investigation Finds Questionable Business Practices, Dangerous use of Pesticides, Fear Among Plantation Workers*, CINCINNATI ENQUIRER, May 3, 1998, at A1; *An Apology to Chiquita; Enquirer: Voicemail Tapes Were Taken Illegally*, CINCINNATI ENQUIRER, June 28, 1998 at A1; See also James C. Goodale, *Why Did the 'Enquirer' Pay \$10 Million?*, N.Y. L.J., Aug. 7, 1998, at 3.

5. See *infra* notes 210-11.

6. Remittitur is defined as "[t]he procedural process by which an excessive verdict of the jury is reduced." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990).

Remittitur allows a judge to reduce a damages award without sending the case back to the jury. The procedure can be charitably described as less time consuming, more efficient, and less intrusive on the jury's role as fact finder than a new trial, or it can be uncharitably described as a form of judicial blackmail. Immediately following the trial or on appeal, the judge offers the winning plaintiff what amounts to a Hobson's choice: either accept a reduced damages award or submit to a new trial. Most plaintiffs—fearing the time, expense, and uncertainty of a new trial—take the money. As a result, courts have reduced the damages and only the defendant has the right to appeal. Thus, courts removed the jury from the equation.

Many student-written notes and comments, along with a few articles, have debated the effectiveness of remittitur and its constitutionality in light of the Seventh Amendment right to a jury trial.<sup>7</sup> As a practical matter, remittitur's constitutionality is well-settled.<sup>8</sup> Its historical origins, however, are more of a mystery, particularly its use in tort cases involving the press. This paper explores the nineteenth-century origins of remittitur in American law in order to explain why judges refused to employ remittitur in cases involving the press until the turn of the century. Secondly, it shows how judges have integrated remittitur into modern libel law and, using the recent

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7. See David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995); Francis X. Busch, *Remittiturs and Additurs in Personal Injury and Wrongful Death Cases*, 12 DEF. L.J. 521 (1963); Leo Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1 (1942); Fleming James, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQ. L. REV. 143 (1963); Irene D. Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157 (1987/88) [hereinafter Sann, *Remittiturs in Federal Courts*]; Victor M. Casini, Note, *O'Gilvie v. International Playtex, Inc.: An Improper Remittitur of a Punitive Damages Award*, 81 NW. U. L. REV. 288 (1987); Diane Garcia, Comment, *Remittitur in Environmental Cases: Developing a Standard of Review for Federal Courts*, 16 B.C. ENVTL. AFF. L. REV. 119 (1988); Richard Kinder, Comment, *Appellate Remittitur*, 33 MO. L. REV. 637 (1968); Barbara Lerner, Note, *Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damages Cases*, 43 U. CHI. L. REV. 376 (1976); Christian J. Mixer, Note, *Appealability of Judgments Entered Pursuant to Remittitur in Federal Courts*, 1975 DUKE L.J. 1150 (1975); Michael A. Newsome, Comment, *Additur and Remittitur in Federal and State Courts: An Anomaly?*, 3 CUMB. L. REV. 150 (1972); S.T. Rayburn, Comment, *Statutory Authorization of Additur and Remittitur*, 43 MISS. L.J. 107 (1972); Irene Sann, Note, *Remittitur Practice in Federal Courts*, 76 COLUM. L. REV. 299 (1976) [hereinafter Sann, *Remittitur Practice*]; William H. Wagner, Note, *Procedures to Lessen Remittiturs's Intrusion on the Seventh Amendment Right to Jury Trial*, 1979 WASH. U. L.Q. 639 (1979); Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318 (1934); Note, *Constitutional Law—Right to Jury Trial—Judicial Use of Additurs in Correcting Insufficient Damage Verdicts*, 21 VA. L. REV. 666 (1935).

8. See 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2815, at 163 (2d ed. 1995). The Supreme Court has upheld the constitutionality of remittitur on numerous occasions. See, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 483 (1935); *Hansen v. Boyd*, 161 U.S. 397, 411 (1896); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 73-74 (1889); *Northern Pac. R.R. v. Herbert*, 116 U.S. 642, 646 (1886). *Dimick* upheld the constitutionality of remittitur but not additur, where the judge finds the jury's damages award to be insufficient and adds to the total amount. See *Dimick*, 293 U.S. at 486-87.

*Food Lion* case as an example, how judges have employed remittitur as a constitutional safeguard against excessive punitive damages in cases involving the press.

Very few scholars have examined the changing relationship between judge and jury during the nineteenth century solely in the context of damages.<sup>9</sup> Fortunately, several nineteenth-century treatise writers addressed this topic. Theodore Sedgwick published the first of nine editions of his treatise on damages in 1847.<sup>10</sup> Sedgwick's treatise is a natural starting point for a discussion of damages. Two other nineteenth-century treatises on new trial, one by David Graham<sup>11</sup> and another by Thomas Waterman,<sup>12</sup> are also vitally important to a historical discussion of remittitur. Secondly, state and federal cases in the nineteenth-century appellate reporters support this paper's conclusions.<sup>13</sup> Finally, Lawrence Friedman's and Morton Horwitz' leading surveys about the development of American law in the nineteenth century lay the groundwork for several competing historical narratives about why judges began employing remittitur in libel cases.<sup>14</sup>

Part I explains why remittitur did not take hold in libel cases until the end of the nineteenth century by placing remittitur in the context of changing judge-jury relations during America's industrialization. It discusses Horwitz' thesis that nineteenth-century American judges were concerned about jury discretion in commercial and contracts cases. Certainly newspapers were not perceived as viable commercial interests until the end of the century. The Horwitz thesis, however, provides only one of several plausible explanations for the evolution of remittitur. Part I argues that the rise of personal injury lawsuits, which was documented by Friedman and others,<sup>15</sup> was a major factor in increasing the use of remittitur in libel cases by turn-of-the-century judges.

Part II views modern tort cases involving the press as a power struggle between judges and juries and contends that remittitur has been an important judicial weapon in protecting the press from some of the jury's most excessive damage awards. First, it shows how judges have integrated remittitur into the

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9. One of the few explorations of this subject is Renee Lettow's excellent article about the nineteenth-century origins of new trial. See Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505 (1996).

10. See, e.g., THEODORE SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* (New York, John H. Voorhies, 1852).

11. See DAVID GRAHAM, *AN ESSAY ON NEW TRIALS* (New York, Halsted & Voorhies, 1834).

12. See THOMAS W. WATERMAN, *A TREATISE ON THE PRINCIPLES OF LAW AND EQUITY WHICH GOVERN COURTS IN THE GRANTING OF NEW TRIALS IN CASES CIVIL AND CRIMINAL* (New York, Banks, Gould, & Co. 1855) (3 vols.).

13. See *infra* Part I.C.

14. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d. ed. 1985); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

15. See *infra* note 114.

elaborate procedural framework created since *New York Times v. Sullivan*,<sup>16</sup> beginning with the Fifth Circuit's decision in *Curtis Publishing v. Butts*.<sup>17</sup> Second, it analyzes the pros and cons of employing remittitur in modern libel cases. Finally, it focuses on the use of remittitur in the recent *Food Lion* case as a paradigmatic example of how judges can protect the press from financial intimidation. Finally, Part III suggests possible reform measures that will help judges decide whether to employ remittitur in libel cases with excessive damage awards.

## I. REMITTITUR IN NINETEENTH-CENTURY AMERICAN LAW

### A. *The English Practice of Remittitur*

Long before the English abandoned the idea of a civil jury, eighteenth-century commentators such as Blackstone believed that "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law."<sup>18</sup> In an attempt to discern whether or not remittitur violates the Seventh Amendment right to a jury trial,<sup>19</sup> American judges have frequently debated the scope of the eighteenth-century English practice of remittitur. How and to what extent English judges employed remittitur at that time is extremely unclear, in part because eighteenth-century tort cases were few and far between.<sup>20</sup> The only certain thing is that, at the time of the adoption of the Seventh Amendment in 1791, remittitur existed in England in some limited form.<sup>21</sup> Remittitur practice continued in England during the nineteenth century,<sup>22</sup> but the House of Lords seemed to abandon it during the early

16. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

17. *Curtis Publ'g v. Butts*, 51 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967).

18. 3 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 379 (U. Chi. Press 1768).

19.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

20. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1178-79 (1996).

21. See JOSEPH SAYER, THE LAW OF DAMAGES 180 (Dublin, J. Moore 1792); Beardmore v. Carrington, 2 Wils. 244, 95 Eng. Rep. 790 (K.B. 1764). English courts also employed additur, increasing damages that they deemed insufficient, such as in cases of mayhem. See FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS (21a) (London, 7th ed. 1733).

22. See JOHN D. MAYNE, A TREATISE ON THE LAW OF DAMAGES 453 (2nd ed. 1872) ("Nor will the Court in any case now reduce the damages without the consent of the plaintiff, and if he refuse, they can do nothing but order a new trial."); *Belt v. Lawes*, 12 Q.B.D. 356 (1884) (refusing to grant a new trial in a libel case if the plaintiff accepts consent to reduction in damages from £5000 to £500). See *id.* at 358

twentieth century.<sup>23</sup> Modern British appellate courts, however, have limited power to interfere with excessive jury awards in libel cases.<sup>24</sup>

Out of England's doctrinal confusion over remittitur, American courts borrowed two main ideas. First, remittitur developed as an alternative to a new trial. English judges began granting new trials for excessive damages at least as early as 1655, and remittitur was a natural outgrowth of this practice.<sup>25</sup> During the eighteenth century, commentators such as Blackstone believed civil jury trials to be "expeditious and cheap."<sup>26</sup> As civil jury trials became more complex, expensive, and time consuming, however, remittitur served as a more efficient remedy than new trials. In the 1764 case of *Beardmore v. Carrington*, an English judge asked the plaintiff to accept a reduced amount of damages rather than grant a new trial.<sup>27</sup> Judges had to grant new trials when juries acted out of passion or prejudice because such emotions may have affected not only the damages but also the verdict. Furthermore, judges viewed remittitur as more judicially intrusive than a new trial because remittitur cut the jury out of the process.

Second, English judges granted new trials more frequently in contract cases with easily calculable damages than in tort cases where the amounts of damages were unclear.<sup>28</sup> One of the most respected eighteenth-century English treatises laid down the rule:

In actions founded upon torts, the jury are the sole judges of the damages; and therefore, in such cases, the court will not grant a new trial on account of the damages being trifling or excessive. But in actions founded upon contract, where the debt would lie . . . the

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("I see nothing in principle against reducing the damages under such circumstances, and it has certainly for years been the invariable practice of the Courts to do so.")

23. See *Watt v. Watt*, [1905] App. Cas. 115 (appeal taken from Eng.) (overturning *Belt v. Laves* and rejecting a reduction of damages in a libel case from £5000 to £1500 because both parties did not consent). Ordinarily, only one side has to consent to remittitur—the winning plaintiff. In this case, however, the court ruled that both the winning plaintiff and the losing defendant have to consent. See *id.* at 116.

24. See 12 HALSBURY'S LAWS OF ENGLAND 135, ¶ 267 (4th ed. 1974) ("In any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are either excessive or inadequate, the court may, instead of ordering a new trial, substitute such sum as appears to the court to be proper.")

25. See BLACKSTONE, *supra* note 18, at 388.

26. See John Langbein, *Introduction to 3 WILLIAM BLACKSTONE, COMMENTARIES*, at vii; *Id.* at \*378.

27. See *Beardmore v. Carrington*, 2 Wils. 244, 248, 95 Eng. Rep. 790 (K.B. 1764). *Beardmore* allowed the plaintiff to accept a reduction of damages based upon a writ of inquiry. See *id.* At least one nineteenth-century commentator believed the court went too far by asking the plaintiff to remit a portion of the damages. See 3 WATERMAN, *supra* note 12, at 1129-30.

28. See Lettow, *supra* note 9, at 547.

court will inquire into the circumstances of the case, and relieve if they see reason.<sup>29</sup>

*Beardmore v. Carrington* made a further distinction among different kinds of tort cases with easily calculable economic damages, such as assumpsit and trespass, and personal tort cases, slander, and malicious prosecution.<sup>30</sup> In the latter group of cases, unless the damages were "monstrous" or "enormous," the court would not interfere.<sup>31</sup> In *Beardmore*, however, the court compromised by setting aside the verdict unless the plaintiff remitted the excess.<sup>32</sup> The reluctance of English judges to interfere in personal torts had a profound influence on American judges as they granted new trials and used remittitur during the nineteenth century.

### B. *The Judge and Jury in Eighteenth-Century America*

During the eighteenth century, the power of juries in America was at an all-time high. According to both English and American law, juries are supposed to be the triers of fact and judges are supposed to be the interpreters of law. This distinction between law and fact, however, has shifted over time. In many cases, eighteenth-century American juries took it upon themselves not only to decide the facts but also to determine the law.<sup>33</sup> The famous freedom of the press case of New York publisher John Peter Zenger was a classic example. In 1734, a jury ignored the law that equated mere publication with the crime of seditious libel and acquitted Zenger.<sup>34</sup> The colonists believed in

29. BULLER, *supra* note 21, at 327.

30. The court said:

There is a great difference between cases of damages which be certainly seen, and such as are ideal; as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, or ideal. We desire to be understood that this court does not say, or lay down any rule, that there can never happen a case of such excessive damages in tort, where the court may not grant a new trial; but in that case, the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against at first blush.

*Beardmore*, 2 Wils. at 250.

31. *Id.*

32. *See id.* at 248.

33. During the eighteenth century, judges began issuing jury instructions and judicial opinions, which led to the rise of appellate review. *See* WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1994).

34. *See* JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* 23 (Stanley Katz ed., 1963); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 128-33 (1985). Today, scholars discuss the Zenger case as a precursor to jury nullification in modern criminal cases. *See, e.g.*, JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 61-75 (1994); Paul

juries as a way of protecting the people from political tyranny. In adopting the Seventh Amendment, the Founders also strongly believed in the right to jury trial as a way of insuring individual liberties.<sup>35</sup> By the end of the century, however, judges began to view juries that controlled both the law and the facts as contributing to the arbitrariness and uncertainty of verdicts.<sup>36</sup> The struggle between judges and juries, Professor Horwitz asserts, highlighted the "uncertainty and contradiction attending judicial decisions" and led to the creation of published reports.<sup>37</sup> The nineteenth-century appellate reporters reveal how judges limited the power of juries through the increased use of procedural innovations such as new trial and remittitur.

### C. The Nineteenth-Century Origins of Remittitur

Encroaching upon the power of juries during the Industrial Revolution, American judges began inventing a number of procedural rules to protect commercial interests from unlimited jury discretion to award damages. The rules originated with the famous nineteenth-century British contract case *Hadley v. Baxendale*,<sup>38</sup> which according to Richard Danzig, "can usefully be analyzed as a judicial invention in an age of industrial invention."<sup>39</sup> *Hadley v. Baxendale* entrenched the power of judges to instruct juries on damages, and it prevented juries from considering expectation damages in contract cases.<sup>40</sup> In Danzig's seminal article, he observed that "the case not only modifies instructions to juries, it also directs judges to keep some issues from the jury."<sup>41</sup> Danzig discovered that *Hadley v. Baxendale* was heavily influenced by the famous nineteenth-century American treatise-writer Theodore Sedgwick, who believed that in contract cases where damages were clearly defined, judicial instructions could control the amount of damages.<sup>42</sup> *Hadley*

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Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). But see David A. Pepper, *Nullifying History: Modern Day Misuse of the Right to Decide the Law*, CASE W. RES. L. REV. (forthcoming 2000) (arguing that Zenger and other historical cases should not be labeled jury nullification).

35. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995) ("No idea was more central to our Bill of Rights—indeed, to America's distinctive regime of government of the people, by the people, and for the people—than the idea of the jury."). See also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); Akhil Reed Amar, *The Bill of Rights*, 100 YALE L.J. 1131 (1991).

36. See HORWITZ, *supra* note 14, at 28.

37. *Id.*

38. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854).

39. Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUDIES 249-50 (1975).

40. See *Hadley*, 156 Eng. Rep. at 151.

41. Danzig, *supra* note 39, at 254.

42. See *id.* at 257.

v. *Baxendale* began a tradition of judge-made law that provided specific and concrete instructions about jury-awarded damages in contract cases. Although judges failed to develop similar common law standards for damages in the tort field, they limited the discretionary power of juries in tort cases through a variety of procedural devices such as special verdict, directed verdict, new trial, and eventually remittitur.<sup>43</sup>

### 1. Joseph Story and the Introduction of Remittitur into American Law

One of the leading proponents of these judicial practices was Supreme Court Justice Joseph Story. Justice Story, who decided the famous federal common law case of *Swift v. Tyson*,<sup>44</sup> tried to create a general commercial law to give "interstate merchants consistent economic rules that suited their own interests and that they had in part created."<sup>45</sup> In 1812, Justice Story set aside a jury verdict as contrary to law because the damages in a commercial dispute "would be in the highest degree unfavorable to the interests of the community" and because commercial interests "would be involved in utter uncertainty."<sup>46</sup> Merchants preferred a system of clear rules that favored repeat players. Jury discretion, however, added uncertainty to dispute settlements. Justice Story's use of remittitur was one way of limiting jury discretion and providing clear rules.

Protecting commercial interests from uncertainty explains Justice Story's innovative use of remittitur. In 1822, while riding the circuit in New England, Justice Story introduced remittitur into American law in the case of *Blunt v. Little*.<sup>47</sup> A jury awarded \$2000 in damages in a malicious prosecution case.<sup>48</sup> Justice Story agreed to reject the defendant's motion for a new trial if the plaintiff agreed to remit \$500 of the \$2000.<sup>49</sup> The plaintiff accepted, and remittitur in American law was born. Justice Story recognized the boldness of his procedural innovation:

I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law. After full reflection, I am of opinion, that it is reasonable, that the cause

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43. See Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

44. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

45. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 340 (1985).

46. *The Schooner Lively*, 15 F. Cas. 631, 634-35 (1812) (No. 8, 403); HORWITZ, *supra* note 14, at 28.

47. *Blunt v. Little*, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1,578).

48. See *id.* at 760.

49. See *id.* at 762.

should be submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages. If he does, the court ought not interfere farther.<sup>50</sup>

Justice Story became well known as a friend of business interests while riding the circuit.<sup>51</sup> R. Kent Newmyer, Story's biographer, wrote: "What businessmen wanted from Story, then, was not so much the creation of new rules as the clarification and refinement of old ones and their fair application to the increasingly complex economic life of the section."<sup>52</sup> With remittitur, however, Story had introduced a new rule. Many nineteenth-century American judges, in denying a motion for a new trial, used remittitur as an alternative route to reducing excessive damages.<sup>53</sup>

## 2. The Extremely Rare Use of Remittitur in Personal Tort Cases

Despite Justice Story's decision in *Blunt v. Little*, most judges, including Justice Story himself,<sup>54</sup> did not use remittitur in cases of malicious prosecution and other personal torts in which the damages were not easily calculable. Both Graham's and Waterman's treatises on new trial laid down a clear rule that in personal tort cases, judges should leave the question of damages to the jury, except in extreme circumstances.<sup>55</sup> During the nineteenth century, many state and federal judges employed remittitur more frequently in contract cases

50. *Id.*

51. See NEWMYER, *supra* note 45, at 316-32.

52. *Id.* at 328.

53. By 1855, remittitur was regarded as an accepted practice in American law. Waterman wrote: "[W]here a judgement is entered up for more than the amount due, a motion by defendant for a new trial will be refused, on condition that plaintiff remit the excess." 3 WATERMAN, *supra* note 12, at 1162.

54. See *Thurston v. Martin*, 23 F. Cas. 1189 (C.C.D.R.I. 1830) (No. 14,018). In a false imprisonment case decided eight years after *Blunt v. Little*, Justice Story refused to set aside a verdict because of excessive damages:

The court in setting aside a verdict for excessive damages, should clearly see, that they are excessive: that there has been gross error; that there has been a mistake of principles, upon which the damages have been estimated; or some improper motives, or feelings, or bias, which has influenced the minds of the jury. If the verdict be not subjected to some such imputations, it is not the practice of the court to disturb the verdict. It is an exercise of sound discretion, which in some degree interferes with the conclusiveness of verdicts, and ought not to be resorted to except in clear cases.

*Id.* at 1190.

55. In the first American treatise on new trials in 1834, Graham wrote: "In personal torts and actions, generally sounding in damages, it being within the strict province of the jury to estimate the injury; unless there be a manifest abuse, the court will not interfere." GRAHAM, *supra* note 11, at 52. Twenty years later, Waterman presented the rule in a slightly more relaxed form: "[I]n actions of personal torts, courts . . . interfere with verdicts on the ground of excess damages, with reluctance." 3 WATERMAN, *supra* note 12, at 1128. Renee Lettow referred to these personal tort cases as "dignitary harms." Lettow, *supra* note 9, at 526.

and in tort cases where the damages were easily calculable such as landlord-tenant disputes,<sup>56</sup> debt<sup>57</sup> and bond recovery,<sup>58</sup> breach of contract,<sup>59</sup> land disputes,<sup>60</sup> and destruction of property.<sup>61</sup> Judges granted new trials but did not use remittitur<sup>62</sup> when the jury acted with "passion" or "prejudice" because such emotions may have tainted not only the damages award but also the verdict.<sup>63</sup> The rule against interfering in personal torts cases applied to both new trials and remittitur.

Judges, in refusing to employ new trial and remittitur in personal tort cases, did not adhere to a bright-line rule. Exceptions existed, particularly when the damages were outrageous, grossly excessive, or awarded out of passion or prejudice. Some judges used remittitur based on the facts of a specific case. A New York judge asked an old lady who was hit by a horse-drawn carriage and broke her arm to remit \$500 of \$1500.<sup>64</sup> A Maine judge asked a man suing over a slightly botched but medically necessary amputation to remit \$500 of \$2025 because surgeons are indispensable to small communities.<sup>65</sup> A survey of dozens of nineteenth-century cases reveals that judges, in using remittitur, invaded the jury's right to award damages in personal torts only on rare occasions.<sup>66</sup>

56. See, e.g., *Evertsen v. Sawyer*, 2 Wend. 507, 512 (N.Y. Sup. Ct. 1829).

57. See, e.g., *Fulton v. Hunt*, 3 Ark. 280, 282 (1842); *King v. Howard*, 55 Mass. (1 Cush.) 137, 141 (1848); *Sanborn v. Emerson*, 12 N.H. 57, 67 (1841); *Theavenenought v. Hardeman*, 13 Tenn. (4 Yer.) 565, 566 (1833).

58. See, e.g., *Ridgeway v. Marshall*, 6 Miss. (5 Howard) 286, 286 (1840); *Pontius v. Commonwealth*, 4 Watts & Serg. 52, 53-54 (Pa. 1842).

59. See, e.g., *Doyle v. Dixon*, 97 Mass. 208, 213 (1867); *Young v. Englehard*, 2 Miss. (1 Howard) 19, 20 (1834); *C. & M. R.R. v. Himrod Furnace Co.*, 37 Ohio St. 434, 444 (1882).

60. See, e.g., *Eaton v. Jones*, 107 Cal. 487, 491 (Cal. 1895); *Johnson v. Duncan*, 16 S.E. 88, 89 (Ga. 1892); *McAllister v. Mullanphy*, 3 Mo. 28, 29 (1831).

61. See, e.g., *Hayden v. Florence Sewing Machine Co.*, 54 N.Y. 221, 225 (1873); *Hodges v. Hodges*, 46 Mass. (5 Met.) 205, 212 (1842).

62. See, e.g., *Stafford v. Pawtucket Hair-Cloth Co.*, 22 F. Cas. 1030, 1031 (C.C.D.R.I. 1862) (No. 13,275).

63. Lettow, *supra* note 9, at 542.

64. See *Diblin v. Murphy*, 3 Sanf. Super. Ct. 19, 21-22 (N.Y. 1849).

65. See *Howard v. Grover*, 28 Me. 97, 101 (1848).

66. One New York Court wrote:

It is not enough, that, in the opinion of the court, the damages are too high. It may not, rightfully, substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury. On the other hand, a jury must not be allowed to exercise despotic power. As they partake of the common infirmities of humanity, they are liable, occasionally, to exceed the bounds of sober judgement, though such instances, at the present day at least, are extremely rare. When they do occur, it is the unquestionable duty of the court to interfere, not by substituting its own judgment for that of a jury, but by ordering the case to be submitted to another jury.

*Collins v. Albany and Schenectady R.R.*, 12 Barb. 492, 495 (N.Y. App. Div. 1852). See 3 WATERMAN, *supra* note 12, at 1134. Cf. Thomas C. Clark, *The Impact of Nineteenth Century Missouri Courts upon Emerging Industry: Chambers of Commerce or Chambers of Justice*, 63 MO. L. REV. 51, 72 n.138 (1998)

### 3. The Nonexistent Use of Remittitur in Libel and Defamation Cases

Nineteenth-century judges rarely, if ever, interfered with jury-awarded damages in libel and defamation cases involving the press. The Graham treatise, in its first edition, relied on English law to suggest that libel and slander suits should be left to the "despotic power of the jury."<sup>67</sup> The second edition expounded on this rule:

Upon the whole, it appears, that in actions for defamation, although the courts in every instance assert their power, no relief on the mere question of excessiveness of damages, in the present state of the practice, can reasonably be expected. In the vast range of this subject, and the numerous applications that have been made, the imagined case, of an outrageous verdict, has scarcely ever occurred.<sup>68</sup>

Many of the damage awards in nineteenth-century libel and defamation cases were exemplary, which is another name for modern-day punitive damages. Even if the exemplary damages seemed excessive, however, nineteenth-century judges refused to interfere with libel and defamation cases.<sup>69</sup> The only chance of judicial interference occurred if the damage award was a product of a "corrupt," "partial," or "passionate" jury.<sup>70</sup>

No record of judicial interference in early and mid nineteenth-century libel cases involving the press has been uncovered. For example, in the 1812 case of *Coleman v. Southwick*,<sup>71</sup> a jury awarded a newspaper editor \$5000 for being libeled in a rival publication, yet the appellate court refused to intervene:

It is not enough to say that in the opinion of the court the damages are too high, and that we would have given much less. It is the

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(finding no instances of remittitur in nineteenth-century Missouri tort cases).

67. GRAHAM, *supra* note 11, at 426.

68. DAVID GRAHAM, A TREATISE ON THE LAW OF NEW TRIALS IN CASES CIVIL AND CRIMINAL 434 (New York, Banks, Gould & Co. 1855).

69. Theodore Sedgwick, in his famous treatise on damages, wrote:

In the United States, generally, the power of the jury to give exemplary damages, where circumstances of aggravation render it impossible to apply any fixed rule of law, has been steadily maintained. In slander and libel, indeed, the law requires no proof of actual injury whatever; to entitle the plaintiff to such amount as the jury see fit to give; the only restriction, in all of these cases, being the power exercised by the courts over corrupt, partial and passionate verdicts.

SEDGWICK, *supra* note 10, at 482, 489 (quoted in 3 WATERMAN, *supra* note 12, at 1121).

70. SEDGWICK, *supra* note 10, at 482, 489.

71. *Coleman v. Southwick*, 9 Johns. 45 (N.Y. Sup. Ct. 1812).

judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries.<sup>72</sup>

Judicial interference in libel and defamation being extremely rare, even nonexistent, nineteenth-century juries basically had free reign in this subset of cases.

*Coleman v. Southwick* was one of four early nineteenth-century libel cases involving the press in which New York judges refused to grant new trials because of excessive damages.<sup>73</sup> Only one of the cases, *Root v. King*,<sup>74</sup> was decided after Justice Story had introduced remittitur into American law in *Blunt v. Little*.<sup>75</sup> The defendant's counsel in *Root* urged the court to follow *Blunt* and grant a motion for a new trial.<sup>76</sup> The court rejected the motion: "In actions for libel, and for other defamation, unless some rule of law has been violated, or there has been some improper conduct by the parties or jury, a new trial will not be granted."<sup>77</sup> Although counsel had made the court aware of the *Blunt* precedent, the court did not explicitly discuss remittitur in its opinion. Instead, the court relied on the rules adhered to by the three previous libel cases that had addressed damages: "We cannot interfere on account of the damages. A case must be very gross, and the recovery enormous, to justify our interposition on a mere question of damages, in an action of slander."<sup>78</sup> No interference meant no interference—judges did not grant new trials or employ remittitur in early and mid nineteenth-century libel and defamation cases.

#### D. Historical Explanations for the Lack of Interference in Libel Cases

Several historical rationales can explain why judges failed to order new trials or to employ remittitur in nineteenth-century libel cases. The analysis of these explanations is historically significant because it helps us understand how the use of remittitur became so widespread. By the early twentieth century, the use of remittitur in libel cases was a common

72. *Id.* at 51.

73. See *Root v. King*, 7 Cow. 613 (N.Y. Sup. Ct. 1827); *Southwick v. Stevens*, 10 Johns. 444 (N.Y. Sup. Ct. 1813); *Coleman*, 9 Johns. at 45; *Tillotson v. Cheetham*, 2 Johns. 63 (N.Y. Sup. Ct. 1806). This article focuses on New York cases because, as one scholar noted, "[l]ibel suits were far more common in New York than elsewhere." DONNA LEE DICKERSON, *THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH-CENTURY AMERICA* 58 (1990).

74. *Root v. King*, 7 Cow. 613 (N.Y. Sup. Ct. 1827).

75. See *supra* text accompanying notes 44-53.

76. See *Root*, 7 Cow. at 616.

77. *Id.* at 637.

78. *Id.* at 636 (citing *Tillotson v. Cheetham*, 2 Johns. 63, 74 (N.Y. Sup. Ct. 1806)).

practice.<sup>79</sup> No dramatic transformation took place at the dawning of the twentieth century, with judges suddenly using remittitur to protect newspapers from excessive damages in libel cases. Thus, in order to understand this legal evolution, it will be helpful to explain its origins.

### 1. Damages Were Not Easily Calculable

Judges did not interfere in nineteenth-century libel cases because, like personal tort cases, the damages were not easily calculable. A Georgia judge wrote: "The reason why the Court will not disturb the verdict of the Jury in batteries, libels, *crim. cons.* malicious prosecutions, and the like, is, that there is in fact no criterion of damages to regulate the verdict."<sup>80</sup> As a practical matter, this makes perfect sense. If the damages cannot be calculated, then it will be impossible for a judge to employ remittitur by determining what percentage of the damages is excessive, without coming up with a totally arbitrary figure. Damages are almost always hard to calculate in libel and defamation cases, particularly when punitive or exemplary damages are involved. Thus, it is not surprising that nineteenth-century judges did not employ remittitur in this subset of personal tort cases.

### 2. Nineteenth-Century Judges More Vigilantly Guarded the Reputations of Public Figures

Renee Lettow, in her article on new trials, posited that "[e]arly nineteenth-century reporters reveal a world in which dignitary concerns—honor and good name—were far more prized than today."<sup>81</sup> Borrowing the title of Norman Rosenberg's monograph on the history of American libel law, judges were "Protecting The Best Men,"<sup>82</sup> or at least their reputations. While this thesis is undoubtedly true to at least some degree, it does not explain why judges such as Justice Story made exceptions for cases of malicious prosecution but not for libel and defamation cases. Particularly in libel and defamation cases involving the press, Lettow's thesis about "dignitary concerns" reveals only part of the story—it ignores the symbiotic nineteenth-century relationship between the press and political parties.

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79. See, e.g., *Prussing v. Jackson*, 69 N.E. 771 (Ill. 1904); *Cunningham v. Underwood*, 116 F. 803 (6th Cir. 1902).

80. *Bishop v. Mayor of Macon*, 7 Ga. 200, 204 (1849).

81. Lettow, *supra* note 9, at 548.

82. NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETATIVE HISTORY OF THE LAW OF LIBEL* (1986).

The rise of political parties during the early nineteenth century greatly influenced the development of American journalism—creating what was known as the party press.<sup>83</sup> Newspapers often served as partisan vehicles to attack rival candidates and politicians, with political disputes erupting into harsh, personal attacks in the press. Rosenberg wrote:

Newspapers, judges often complained in their opinions, devoted far too much space to abusing public figures and tearing down the reputations of people who entered the public forum. Thus, early nineteenth-century courts invariably rejected legal formulae designed to relax some of the restraints libel laws imposed upon the press.<sup>84</sup>

When newspapers made personal attacks against politicians, judges refused to reduce the jury-imposed damage awards. For example, in the 1806 case of *Tillotson v. Cheetham*,<sup>85</sup> a jury levied a \$1400 damages award against the *Republican Watch-Tower* for accusing the Secretary of State of bribery and fraud.<sup>86</sup> The judge denied the motion for a new trial because of excessive damages.<sup>87</sup> Twenty years later, in *Root v. King*,<sup>88</sup> the jury handed down another \$1400 damages award, this time against the *New-York American*, for accusing the state's Lieutenant Governor of presiding over the Senate while intoxicated.<sup>89</sup> In contrast to modern libel law, judges afforded nineteenth-century politicians *more* protection from libel because the politicians were public figures.<sup>90</sup> Newspapers, viewed as party vehicles, received little or no protection. Neither the concerns about protecting the reputations of public

83. See GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* 11-35; DICKERSON, *supra* note 73 at 55-79; ROSENBERG, *supra* note 82, at 130-52.

84. ROSENBERG, *supra* note 82, at 126.

85. *Tillotson v. Cheetham*, 2 Johns. 63 (N.Y. Sup. Ct. 1806).

86. *See id.* at 63-64.

87. *See id.* at 74. The plaintiff was awarded another \$800 in a subsequent lawsuit against the same newspaper. *See Tillotson v. Cheetham*, 3 Johns. 56, 56-59 (N.Y. Sup. Ct. 1808); ROSENBERG, *supra* note 82, at 126.

88. *Root v. King*, 7 Cow. 613 (N.Y. Sup. Ct. 1827).

89. *See id.* at 620.

90. The judge in *Tillotson* wrote:

The plaintiff, when libeled, was a high and confidential officer of government: and by the libel he is held out to the world as an object of reproach. He is represented as being seduced into unworthy and dishonorable conduct, by motives equally mean and unworthy. This was a printed defamation, which is regarded in law as the most injurious and aggravated species of slander, because it has a wider circulation, makes a deeper impression, and has a more permanent existence.

*Tillotson*, 2 Johns. at 74. Judges not only protected politicians from vicious attacks but also rival newspaper publishers. *See Southwick v. Stevens*, 10 Johns. 443 (N.Y. Sup. Ct. 1813) (upholding a \$640 jury award for writing that a rival newspaper publisher had gone insane).

figures nor the rule about easily calculable damages, however, provides as comprehensive an explanation for increased use of remittitur as the controversial theory espoused by legal historian Morton Horwitz.

### 3. The Horwitz Thesis: Commercialization and Judge-Jury Relations During the Nineteenth Century

The increasing use of remittitur in nineteenth-century American law comports with Horwitz' theory that judges were concerned about jury discretion in commercial tort and contract cases.<sup>91</sup> Remittitur, under a Horwitzian rationale, was one of several methods that judges used to reduce excessive damages in order to protect commercial interests. For example, an important way that nineteenth-century judges limited jury discretion was to make damages "a question of law."<sup>92</sup> At least one court agreed that "where there is a clear standard for the measure of damages, and no difficulty in applying it—the measure of damages is a question of law, and is necessarily under the control of the court . . ."<sup>93</sup> Judges shifted the law-fact distinction in their favor to circumscribe the power of juries to assess damages. By making damages a question of law, judges could use remittitur to protect commercial interests.

The Horwitz thesis, particularly its causal link between legal change and commercial interests, has elicited a host of criticism.<sup>94</sup> The most common

91. This is a "weak version" of the Horwitz thesis, which put in stronger terms is a conspiracy between judges, elite lawyers, and commercial interests. See HORWITZ, *supra* note 14, at 29. This article rejects this "strong version" of the Horwitz thesis, but do not deny the impact of limiting jury discretion on the economy. See Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMAN. 137, 137 (1994) (book review) (describing the strong version as suggesting that "legal elites helped business interests to accumulate wealth, property and power at the expense of workers, farmers, and consumers").

92. HORWITZ, *supra* note 14, at 80-81.

93. *Schlenker v. Risley*, 4 Ill. (3 Scam.) 483 (1842); 3 WATERMAN, *supra* note 12, at 1136.

94. See, e.g., Eugene D. Genovese, 91 HARV. L. REV. 726 (1978) (book review); Grant Gilmore, *From Tort to Contract: Industrialization and the Law*, 86 YALE L.J. 788 (1977) (book review); Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663 (1982); Willard Hurst, Book Review, 21 Am. J. Legal Hist. 175 (1977); Peter Karsten, *Explaining the Fight over the Attractive Nuisance Doctrine: A Kinder, Gentler Instrumentalism in the "Age of Formalism,"* 10 LAW & HIST. REV. 45 (1992); James H. Kettner, Book Review, 8 J. INTERDISCIPLINARY HIST. 390 (1977); Charles J. McClain, Jr., *Legal Change and Class Interests: A Review Essay of Morton Horwitz' The Transformation of American Law*, 68 CAL. L. REV. 382 (1980); Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1042 (1993) (book review) [hereinafter Moglen, *Transformation*]; Stephen B. Presser, *Revising the Conservative Tradition: Towards a New American Legal History*, 52 N.Y.U. L. REV. 700 (1977) (book review); John Phillip Reid, *A Plat Too Doctrinaire*, 55 TEX. L. REV. 1307 (1977) (book review); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989) [hereinafter Schwartz, *Early American Tort Law*]; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981) [hereinafter Schwartz, *Tort Law in Nineteenth-Century America*]; A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) (book review); Peter R. Teachout, *Light in Ashes: The Problem*

critique of Horwitz' first book<sup>95</sup> is that it relies too heavily on a simple causation between legal change and socioeconomic change.<sup>96</sup> At least one commentator, although crediting Horwitz with observing that judges encroached on the power of juries during the nineteenth century, rejects the connection that judges decreased the power of juries in order to benefit commercial interests.<sup>97</sup> Another commentator claims that American tort liability standards evolved from rudimentary English common law practices.<sup>98</sup> A widely-accepted alternative to the Horwitz thesis is that there are multiple causal connections between legal and social change.<sup>99</sup> That does not mean that the Horwitz thesis should be completely rejected. On the contrary, this paper accepts the idea that judges were concerned about unlimited jury discretion during the Industrial Revolution as one of several competing explanations for the expanded use of remittitur during the nineteenth century.

The implications of the Horwitz thesis seem to account for the shift in the use of remittitur in libel cases. At the beginning of the nineteenth century, many newspapers functioned solely as political vehicles and were not considered commercial interests. Yet by the 1890s, the party press had evolved into the penny press. Newspapers had been transformed from expensive, small-circulation, political vehicles into cheap, large-circulation, highly-commercialized entities that served the urban masses.<sup>100</sup> Rosenberg wrote:

of "Respect for the Rule of Law" in *American Legal History*, 53 N.Y.U. L. REV. 241 (1978) (book review); Stephen F. Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History*, 25 UCLA L. REV. 1187 (1978); Eben Moglen, Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135 (1983).

95. See HORWITZ, *supra* note 14. Horwitz wrote a sequel to the first volume. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) [hereinafter TRANSFORMATION II]. Horwitz described his second volume, which retreated from the simple causation between legal and socioeconomic change, as "a very different book." TRANSFORMATION II at vii. TRANSFORMATION II has been criticized for very different reasons. See, e.g., Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019 (1993) (book review); Gordon, *supra* note 89; James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 HARV. L. REV. 1332 (1993) (book review); Moglen, *Transformation*, *supra* note 92; G. Edward White, *Transforming History in the Postmodern Era*, 91 MICH. L. REV. 1315 (1993) (book review).

96. See, e.g., Kloppenberg, *supra* note 95, at 1338; White, *supra* note 95, at 1321-22.

97. See Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988). Konefsky rejected the causal link between legal and socioeconomic interests as conflating social and legal history. See *id.* at 1124-25.

98. See Schwartz, *Early American Tort Law*, *supra* note 94, at 678.

99. See generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (giving a brief account of critical legal scholars' analysis of the role of history).

100. See BALDASTY, *supra* note 83, at 3 (detailing the nineteenth-century commercialization of the press); MICHAEL SCHUDSON, *ORIGINS OF THE IDEAL OF OBJECTIVITY IN THE PROFESSIONS, 1830-1940*, at 30-48 (1990).

During the late eighteenth and early nineteenth centuries, the names of the cases themselves—*People v. Crosswell*, *Root v. King*, or *Hunt v. Bennett*—suggested an important point: the institutional press of that era was not made up of a series of large corporations, heavily capitalized enterprises that manufactured, marketed, and profited from a highly popular commodity—news.<sup>101</sup>

An implication of Horwitz' work<sup>102</sup> is that early nineteenth-century judges did not deem newspapers worthy of protection from excessive damages because newspapers did not represent commercial interests. As these newspapers developed into commercial entities by the late nineteenth century, however, judges afforded them more protection from excessive damages.<sup>103</sup>

The Horwitzian commercialization interests thesis, however, is too simplistic and incomplete. It fails to explain why judges reduced their protection of the reputations of public figures such as politicians, and why these judges would be more willing to protect the new breed of sensational journalists known as muckrakers. The party press had become the yellow press. Perhaps some public figures, most notably James Fenimore Cooper,<sup>104</sup> had begun abusing the libel laws. Perhaps the corruption of post-Civil War politics, both locally and nationally, had lessened the judiciary's faith in elected officials. For example, the Credit-Mobilier Scandal rocked the administration of Ulysses S. Grant during the late 1860s, and machine-politicians such as Boss Tweed in New York City dominated the local political affairs of major cities by the late nineteenth century. Although the press had become more sensational, it also began serving a civic function as the "watchdog" over government officials.<sup>105</sup>

As a general matter, American libel law during the course of the nineteenth century had become more favorable to the press. The early nineteenth century was a period of transition.<sup>106</sup> On the one hand, civil libel suits began replacing the criminal libel cases of the eighteenth century,<sup>107</sup> while on the other hand, American libel law remained wedded to many of the traditional English common law notions of libel law. For example, *Root v. King* relied on Blackstone's broad definition of libel,<sup>108</sup> and *Coleman v.*

101. ROSENBERG, *supra* note 82, at 184.

102. See generally HORWITZ, *supra* note 14, at 80-84.

103. See ROSENBERG, *supra* note 82, at 197-99.

104. Cooper sued numerous people for libel stemming from critical reviews of his novels. See DICKERSON, *supra* note 73, at 59-60; ROSENBERG, *supra* note 82, at 137-40.

105. See TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA 66-79 (1990).

106. See ROSENBERG, *supra* note 82, at 128.

107. See *id.* at 129.

108. See *Root v. King*, 7 Cow. 613, 620-23 (N.Y. Sup. Ct. 1827).

*Southwick* cited a number of English cases and treatises.<sup>109</sup> Based on the English common law definition, libel in early nineteenth-century American law was basically a strict liability offense. Plaintiffs did not have to show malice, only that the story was false.<sup>110</sup>

Whether it was the commercialization of the press, the lower regard for our elected officials, or the more enlightened ideas about the First Amendment,<sup>111</sup> American law shed its reliance on English common law notions about libel by the end of the century, and libel became a civil, rather than a criminal offense.<sup>112</sup> Libel law began to change and the use of *remittitur* in libel cases began to change along with it. Although Horwitz' thesis about commercial interests provides a partial explanation for this change, it ignores other social forces during the late nineteenth century that affected the development of American law. One of the most important developments was the increase in personal injury lawsuits.

#### 4. The Rise of Personal Injury Lawsuits

Many legal historians have documented the turn-of-the-century explosion of personal injury lawsuits.<sup>113</sup> During this period a larger percentage of tort suits involved personal injury cases.<sup>114</sup> Libel and defamation lawsuits also increased during this period.<sup>115</sup> Although scholars disagree about the reason for the increase in personal injury lawsuits,<sup>116</sup> Professor Lawrence Friedman is generally credited with placing this rise in the context of the industrial revolution.<sup>117</sup> In particular, the increasing number of industrial accidents forced major corporations to seek liability insurance and led to widespread acceptance of the contingent fee system among plaintiffs' lawyers. Friedman,

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109. See *Coleman v. Southwick*, 9 Johns. 45, 52 (N.Y. Sup. Ct. 1812).

110. See *Root*, 7 Cow. at 620 ("[I]f a libel be false malice is inferred, and need not be proved.").

111. See ROSENBERG, *supra* note 82, at 199; DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 155-65* (1997).

112. See ROSENBERG, *supra* note 82, at 199.

113. See RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910* (1992); FRIEDMAN, *supra* note 14; ROBERT SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900* (1981); Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295 (1990); Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351 (1987).

114. In his survey of the New York court system, Randolph Bergstrom found that personal injury lawsuits comprised 41 percent of tort suits in 1870 and 82 percent in 1910. See BERGSTROM, *supra* note 114, at 19.

115. See *id.* at 19-20, tbl. 4.

116. For a brief but thorough review of the scholarly literature, see *id.* at 6-7.

117. See FRIEDMAN, *supra* note 14, at 467-69.

however, placed only secondary importance on these changes.<sup>118</sup> He argued that turn-of-the-century judges and state legislatures relaxed tort rules such as fault, contributory negligence, assumption of risk, and proximate cause that they had created during the mid-nineteenth century to protect business interests.<sup>119</sup> Some rules fell by the wayside, such as the replacement of the fellow-servant rule with workmen's compensation laws.<sup>120</sup> Other rules, such as *res ipsa loquitur* and the last clear chance doctrine, received added importance in an effort to make it easier for plaintiffs to recover under the negligence standard.<sup>121</sup> Friedman argued that the number of personal injury lawsuits increased because the tort laws became more favorable to plaintiffs, therefore the number of lawyers willing to take cases on a contingency fee basis increased because plaintiffs began to win more often.<sup>122</sup> In effect, the number of the personal injury lawsuits increased because judges and state legislatures allowed more tort suits.

At least one mid nineteenth-century procedural device—remittitur—did not fall by the wayside as the tort law became more favorable to plaintiffs. On the contrary, turn-of-the-century judges began employing remittitur with increasing frequency in personal injury cases. As the number of personal lawsuits increased, it became even more imperative for judges to clamp down on excessive damage awards. In many states, the use of remittitur in personal injury cases had become commonplace.<sup>123</sup> During the early twentieth century,

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118. See *id.* at 482 ("Neither the number of accidents nor the contingent fee system, in itself, can completely explain the rise in litigation.").

119. See *id.* at 475. Friedman discusses fault, assumption of risk, contributory negligence, and proximate cause and reasons:

Enterprise was favored over workers, slightly less so over passengers and members of the public. Juries were suspected—on thin evidence—of lavishness in awarding damages; they had to be kept under firm control. The thrust of the rules, taken as a whole, approached the position that corporate enterprise should be flatly immune from actions for personal injury.

*Id.* But cf. Schwartz, *Tort Law in Nineteenth-Century America*, *supra* note 94, at 1718 (criticizing Friedman's and Horwitz' "subsidy thesis" that judges were protecting business interests during the mid-nineteenth century).

120. See Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998).

121. See FRIEDMAN, *supra* note 14, at 482-83.

122. Friedman cited a study of the Wisconsin court system in 1907 that showed plaintiffs winning two thirds of the personal injury cases at the trial level, but only two fifths at the appellate level. See *id.* at 483.

123. An early twentieth-century civil procedure treatise said:

In many of the cases in which the damages awarded by the jury are excessive, the amount of the excess cannot be exactly determined: all that can be said is that the jury have fixed upon an amount unreasonably large. Even in such cases it is held in a great majority of the states that it is proper to deny the defendant's motion for a new trial if the plaintiff is willing to remit so much of the damages awarded as to

judges discarded the distinction between tort cases with easily calculable economic damages and personal tort cases with unquantifiable damages. Such an erosion was inevitable. As David Graham's nineteenth-century treatise on new trial points out, juries are more likely to award excessive damages in personal tort cases.<sup>124</sup> By the same token, judges are more eager to interfere in personal tort cases because sympathetic juries are more likely to award excessive damages.

By employing remittitur and other procedural devices to limit damages in personal injury cases, trial and appellate judges responded to the fears that populist juries would impose outrageous damage awards on deep-pocket corporations.<sup>125</sup> Randolph Bergstrom, in his study of New York injury law during the late nineteenth and early twentieth centuries, wrote about the aggressiveness of trial and appellate judges in curbing excessive awards:

Encouraging punitive damages was rare in 1870 and became rarer with time. . . . Because punitive damages were not tied closely to measurable criteria, as lost wages and medical costs were, judges considered them especially subject to abuse. Further, judges were concerned that juries had a natural tendency to punish even when punishment was not called for; judges wanted to restrain that retributive impulse rather than encourage it. By 1910, warnings were common against juries that tacked extra sums on awards to punish defendants, especially when defendants were corporations.<sup>126</sup>

Quoting a lawyer from the 1896 edition of the *Yale Law Journal*, Bergstrom wrote that "judges acted 'because juries will not do the right thing toward

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leave a balance which is not in itself excessive.

AUSTIN WAKEMAN SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 120-21 (1922).

124. GRAHAM, *supra* note 11, at 409.

[I]f actions sounding in damages, or torts to the person, [the jury is] to be guided by their sense of justice. It is here, however, they are most liable to err. Their feelings and passions are appealed to and excited, and necessarily less or more mix up with the facts; and hence their finding frequently betrays undue motives, and manifests an excess of feeling on one side or the other; sometimes in a culpable excess of damages, and at others in an unjust diminution.

*Id.*

125. See Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1294 (1993) (noting how the focus of punitive damages shifted from individual plaintiffs to large corporations at the end of the nineteenth century). For historical studies of the Populist movement, see, for example, LAWRENCE GOODWYN, *THE POPULIST MOVEMENT* (1978); MICHAEL KAZIN, *THE POPULIST PERSUASION* (1995); NORMAN POLLOCK, *THE JUST POLITY: POPULISM, LAW AND HUMAN WELFARE* (1987).

126. BERGSTROM, *supra* note 113, at 123.

corporations."<sup>127</sup> Both Bergstrom and Friedman agree that judges' fears of populist juries' biases against large corporations may have been unfounded.<sup>128</sup> Whether those fears were real or imagined, judges acted on them. In addition to remittitur, judges employed a number of procedural devices such as dismissal and the use of specific instructions about determinations of fact.<sup>129</sup> Often, judges held off dismissing a case until after the jury announced its award.<sup>130</sup> According to Bergstrom's study, from 1870 to 1910 the amount of damages awarded in the average personal injury case actually declined.<sup>131</sup> Bergstrom wrote: "[W]hile [juries were] supposedly the sole judges of award size, trial or appellate judges frequently overrode the juries' decisions."<sup>132</sup> The easiest way to override a jury's decision about damages was through remittitur.

In sum, Part I.D argues that the rise of personal injury lawsuits led to the increasing use of remittitur in all personal injury cases, including libel cases involving the press. Although the judicial fear of populist juries may have been unfounded, it drove judges to employ remittitur with increasing frequency. By the beginning of the twentieth century, the distinction between contract and tort cases with easily calculable damages and personal injury torts was a mere afterthought. This explanation for the increasing use of remittitur in libel cases, although certainly not the only one, is historically significant because the modern standards for employing remittitur remain inextricably linked to empirical studies of personal injury lawsuits such as medical malpractice and product liability cases.<sup>133</sup> Before Part II explores the use of remittitur in modern libel cases, Part I.E will discuss how remittitur survived judicial review and developed into an accepted practice.

### *E. The Early Twentieth Century Constitutional Challenge to Remittitur*

The attraction of remittitur, as opposed to new trials, was that it allowed judges to tinker with the damage awards in personal injury cases without

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127. *Id.* at 137 (quoting Eli Hammond, *Personal Injury Litigation*, 6 YALE L.J. 328, 331 (1896-97)).

128. See BERGSTROM, *supra* note 113, at 137 ("[J]uries did do the right thing, if the right thing was to treat corporations no differently from individuals who either were engaged in business or not acting in a business capacity at the time of injury."); FRIEDMAN, *supra* note 14, at 484-85 ("There is some evidence that juries were not so rabid on the plaintiff side as judges and text-writers imagined . . . Recoveries, too, were often extremely small.").

129. See BERGSTROM, *supra* note 113, at 132.

130. See *id.* at 136-37.

131. See *id.* at 160-61 & tbl. 24.

132. *Id.* at 136.

133. See, e.g., Baldus, *supra* note 7. For a discussion of the modern significance of personal injury cases on the use of remittitur in libel cases, see *infra* Part II.C.2.

forcing both parties to start from square one. Judges rationalized that the use of remittitur was actually less intrusive on the jury's authority to award damages than a new trial. An early twentieth-century treatise said: "The court is not substituting its judgment for that of the jury; it is not deciding what amount the plaintiff ought to recover; it is merely deciding that a part of what the jury awarded was not an excessive amount."<sup>134</sup> This argument ignores the differences between remittitur and a new trial; a new trial actually returns the case to the hands of the jury. With remittitur, judges can claim that they never remove the awarding of damages from the jury's hands. Although this seems like a dubious distinction, it eventually helped salvage remittitur's constitutionality.

In 1935, in *Dimick v. Schiedt*, the Supreme Court came closer than any time in its history to outlawing the use of remittitur.<sup>135</sup> In a 5-4 decision written by Justice Sutherland, the *Dimick* Court upheld the constitutionality of remittitur but held that additur, the increase of a jury's damage award that the court deems insufficient, violated the Seventh Amendment right to a trial by jury.<sup>136</sup> *Dimick* was a run-of-the-mill personal injury case. The jury awarded the plaintiff only \$500.<sup>137</sup> The defendant, however, accepted the judge's offer to increase the award to \$1500 in lieu of a retrial.<sup>138</sup> The Court claimed that additur did not have any basis in English common law at the time of the adoption of the Seventh Amendment, it intruded on the right to a trial by jury, and therefore it was unconstitutional.<sup>139</sup> The Court said: "the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury. . . ."<sup>140</sup>

Based on similar conclusions about English common law, the *Dimick* Court nearly struck down remittitur as well, but backed off for two principal reasons. First, the Court relied on *stare decisis*.<sup>141</sup> During the late nineteenth century, the Court had affirmed the constitutionality of remittitur on several occasions.<sup>142</sup> Furthermore, the Court was reluctant to overrule Justice Story's 1822 opinion in *Blunt v. Little* without clear proof that remittitur did not exist at English common law at the time of the adoption of the Seventh

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134. SCOTT, *supra* note 123, at 122.

135. *Dimick v. Schiedt*, 293 U.S. 474 (1935).

136. *See id.* at 486. This did not apply to state courts because the Seventh Amendment does not apply to the states. *See Walker v. Sauvinet*, 92 U.S. 90, 92 (1875).

137. *See Dimick*, 293 U.S. at 475.

138. *See id.* at 475-76.

139. *See id.* at 482.

140. *Id.*

141. *See id.*

142. *See, e.g., Hansen v. Boyd*, 161 U.S. 397, 411 (1896); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 73-74 (1889); *Northern Pac. R.R. v. Herbert*, 116 U.S. 642, 646 (1886).

Amendment.<sup>143</sup> The Court, however, expressed its reservations with Justice Story's opinion: "In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise."<sup>144</sup> Stare decisis saved remittitur.

In addition to relying on stare decisis, the Court also concluded that remittitur was in some ways less intrusive on the right to a jury trial than additur.<sup>145</sup> The Court wrote that remittitur "has the effect of merely lopping off an excrescence" whereas additur "is a bald addition of something which in no sense can be said to be included in the verdict."<sup>146</sup> Ultimately, this distinction carried the day with five members of the Court and allowed remittitur, but not additur, to survive constitutional scrutiny.

*Dimick* is a Lochneresque decision.<sup>147</sup> The majority is comprised of the four conservative members of the Court, Justices Butler, McReynolds, Sutherland, and Van Devanter, known during the New Deal as the Four Horsemen. In some sense, *Dimick* reflects the pre-New Deal Court's emphasis on protecting individual rights through property rights and freedom of contract.<sup>148</sup> In a sense, the jury was viewed as the enforcer of these rights, awarding damages when one's property or contract rights had been infringed upon. *Dimick*, however, may be more complicated than that. At least one scholar argues that the Four Horsemen were "closet liberals" who only "struck

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143. The Court wrote:

In the last analysis, the sole support for the decisions of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the Federal Constitution, which we have been able to find.

*Dimick*, 293 U.S. at 484. For proof that remittitur existed at English common law, see *supra* text accompanying notes 18-24.

144. *Id.* at 484. The Court went on the say:

But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

*Id.* at 484-85.

145. See *Dimick*, 293 U.S. at 486.

146. *Id.*

147. See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a state's maximum hours law for bakers as violating substantive due process and the freedom to contract).

148. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 370 (1998).

a reactionary pose in celebrated cases" and who "were notably vigilant . . . in defending the right to trial by an impartial jury of one's peers."<sup>149</sup>

The dissent in *Dimick* reflects the beliefs of the Court's more liberal bloc in an activist, interventionist state associated with the New Deal. They saw judges as a perfect tool to regulate excessive or inadequate damage awards. Justice Stone's dissent, joined by Justices Brandeis, Cardozo, and Chief Justice Hughes, argued that both remittitur and additur were constitutional because the specific eighteenth-century procedures that existed at the time of the adoption of the Seventh Amendment were not controlling as long as the Court maintained "the essentials" of a civil jury trial.<sup>150</sup> Subsequently, the Court's decisions and scholars' works have legitimized Justice Stone's dissent.<sup>151</sup> Based on this central thesis, the dissent made three main points: (1) neither additur nor remittitur affected the essentials of a right to a civil jury trial; (2) additur is no more intrusive on the Seventh Amendment than remittitur; and (3) the English common law employed both additur and remittitur in some limited form.<sup>152</sup> The dissent was undoubtedly right. Nonetheless, the flawed majority opinion has preserved the use of remittitur, but just barely. Although a few judges<sup>153</sup> and commentators<sup>154</sup> have debated remittitur's constitutionality since *Dimick*, the use of remittitur "has increased continuously to the present day."<sup>155</sup> In fact, remittitur has become so pervasive in American law that one modern treatise remarked that declaring remittitur unconstitutional would cause "a judicial uprooting of precedent akin to that effected by *Erie-Tompkins*."<sup>156</sup> Over the last 175 years, remittitur has evolved from a sparingly-used procedural device into an all-purpose effort to

149. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560, 577 (1997).

150. *Dimick*, 293 U.S. at 490-91 (Stone, J., dissenting).

151. See *Galloway v. United States*, 319 U.S. 372, 390-92 (1943) (holding that the Seventh Amendment does not bind the courts to the details of common procedures); Edith Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 289 (1966) ("[T]he amendment was not intended to codify a rigid form of jury practice—that indeed there was no consistent practice in 1790 to be codified."). See generally Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995) (discussing the importance of a jury in a democratic society); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (examining courts' historical test to resolve Seventh Amendment issues).

152. See *Dimick*, 293 U.S. at 492-97 (Stone, J., dissenting).

153. See, e.g., *Bonura v. Sea Land Serv., Inc.*, 512 F.2d 671, 672-73 (5th Cir. 1975) (Goldberg, J., dissenting) ("The doctrine of remittitur rests on a constitutional base of clay.").

154. See, e.g., Carlin, *supra* note 7; Sann, *Remittitur in Federal Courts*, *supra* note 7, at 157 ("[T]he current use of remittitur should be eliminated.").

155. Sann, *Remittitur in Federal Courts*, *supra* note 7, at 163. For a discussion of the modern practice of remittitur, see *infra* Section II.B.

156. See 6A J. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶59.08[7], at 59-185 (2d ed. 1985); *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938) (initiating the application of state law in federal diversity cases).

limit the power of juries, reduce exorbitant damage awards, and promote judicial economy.

Part I focused on the origins of remittitur in American law and the myriad factors that possibly explain the reticence of nineteenth-century judges to employ remittitur in libel and defamation cases until the end of the century. There are a number of plausible historical explanations: (1) the damages were not easily calculable in libel cases, thus making any judicial use of remittitur seem arbitrary; (2) judges afforded public officials greater protection under the mid nineteenth-century libel laws than public officials are afforded today; (3) Professor Horwitz would argue, quite correctly, that newspapers were not considered large commercial interests until the latter part of the century, therefore judges did feel compelled to use remittitur to reduce excessive damage awards; and (4) our conception of a free press remained wedded to English common law notions of libel. None of these theories completely explains why nineteenth-century judges did not employ remittitur in libel. Like much of nineteenth-century legal history, the evolving use of remittitur and its application to libel and defamation cases remains a puzzle.

Part I, however, proposes an additional explanation: the rise of personal injury lawsuits at the turn-of-the-century was a major factor in the expanded use of remittitur in libel and defamation cases involving the press. Judges began employing remittitur more frequently out of concern for populist juries assessing enormous damage awards against deep-pocket corporations. Although Professor Friedman and others have suggested that these fears may have been unfounded, they may have been one of several factors that drove judges to begin employing remittitur in libel and defamation cases.

This latter explanation is historically significant because empirical studies and judicial opinions about personal injury cases such as medical malpractice and products liability drive the modern debate over punitive damages and the role of remittitur. This debate includes what to do about excessive damages in libel and defamation cases—the focus of Part II. Although the Supreme Court permanently altered the relationship between judges and juries by constitutionalizing the law of libel, Part II analyzes the recent *Food Lion* case to argue that remittitur has not gotten lost in the constitutional shuffle. On the contrary, Part II argues that remittitur has assumed an important role in striking the proper balance between judges and juries in modern tort cases involving the press.

## II. JUDGES, JURIES, AND THE USE OF REMITTITUR IN MODERN LIBEL LAW

The history of libel law is best described as a power struggle between judges and juries. For a brief time during the eighteenth century, the colonial jury was viewed as the protector of the free press against English tyranny,

acquitting John Peter Zenger of seditious libel.<sup>157</sup> As nineteenth-century juries began to award damages in libel and defamation cases without judicial oversight, the jury evolved into the free press' biggest enemy. Today juries are anathema to the freedom of the press because of their apparent eagerness to award punitive damages against media defendants. The jury's prominent role in awarding damages, however, has prompted a judicial backlash.

The power of juries to award punitive damages is under attack, not just in libel suits involving the press, but in all tort cases.<sup>158</sup> The Supreme Court, in *BMW of North America, Inc. v. Gore*, held for the first time that a punitive damages award was unconstitutionally excessive.<sup>159</sup> Media organizations<sup>160</sup> and many commentators have argued that punitive damages should either be severely limited or not allowed at all against the press.<sup>161</sup> These proposed remedies, however, are too drastic. The problem of punitive damages has been overstated.<sup>162</sup> Furthermore, many commentators have understated the numerous procedural weapons at the judge's disposal to limit the power of the jury to award damages in libel cases, such as summary judgment, new trial, judgment notwithstanding the verdict, and remittitur. Although not a cure-all, the use of remittitur in cases involving the press can help to strike the proper balance between judges and juries in awarding damages.

Part II briefly places the birth of modern libel law with *New York Times v. Sullivan*<sup>163</sup> in the context of judge-jury relations. Beginning with *Curtis Publishing v. Butts*,<sup>164</sup> it describes how remittitur was used in conjunction with many of *Sullivan's* procedural safeguards. After a brief discussion of how

157. See *supra* note 34 and accompanying text.

158. See, e.g., Roger W. Kirst, *Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective*, 48 SMU L. REV. 63, 76-86 (1994) (discussing the historical origins of remittitur in the context of judicial review of the jury's power to award punitive damages); Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179 (1998); Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991); Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089 (1996).

159. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996).

160. See Brief of Amici Curiae CBS Inc. et al., in Support of Petitioner, *BMW* (No. 94-896) (calling for the elimination of punitive damages in libel cases); Brief of Amici Curiae CBS Inc. et al., in Support of Petitioner, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (No. 89-1279).

161. See, e.g., Nicole B. Casarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667 (1994); William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793 (1983/1984); Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847 (1985). But see Jerome A. Barron, *Punitive Damages in Libel Cases—First Amendment Equalizer?*, 47 WASH. & LEE L. REV. 105, 105 (1990) (arguing that punitive damages ensure media accountability and in recent years have served as a First Amendment "equalizer").

162. See *infra* text accompanying note 216.

163. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

164. *Curtis Publ'g v. Butts*, 388 U.S. 130 (1967).

remittitur is employed in modern practice, Part II explores the use of remittitur in cases involving the press. To evaluate remittitur's effectiveness in eliminating excessive damages, Part II then focuses on the recent *Food Lion* case as a paradigmatic example of how judges can use remittitur to prevent juries from awarding excessive damages.

*A. New York Times v. Sullivan: Curtailing the Jury's Power in Libel Cases*

*New York Times v. Sullivan* marked the birth of modern libel law and the death of the jury's nearly absolute power to award punitive damages against media defendants. Since *Sullivan* spawned an enormous amount of influential popular and scholarly literature, the case will not be reviewed in great detail.<sup>165</sup> *Sullivan*, however, is an important starting point because it highlights the dangers of allowing juries to award unlimited punitive damages against media defendants.

The purpose of punitive damage awards is not compensation, but punishment. Like the criminal law, two of the main objectives of punitive damages are retribution and deterrence.<sup>166</sup> In particular, punitive damages prevent the wrongdoer from deriving some "illicit benefit" and ensures that the victim is not undercompensated for the harm.<sup>167</sup> When the freedom of the press is at stake, however, punitive damages can have a "chilling effect" on the publication of potentially controversial stories.<sup>168</sup> The mere threat of punitive damages could subject the press to self-censorship and intimidation, effectively curtailing any First Amendment notion of a free press.

The *Sullivan* case is a classic example of how punitive damages can inhibit the freedom of the press. The *New York Times* faced punitive damages of up to \$3 million because it published an advertisement on behalf of Martin Luther King's legal defense fund that criticized the law enforcement tactics of Montgomery, Alabama.<sup>169</sup> City officials, although not mentioned by name

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165. See, e.g., ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964).

166. For some recent discussions of the purposes of punitive damages, see Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1428-51 (1993); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 904 (1998); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

167. See Note, *supra* note 161, at 850-51.

168. See *Sullivan*, 376 U.S. at 278 ("Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."); Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

169. See *Sullivan*, 376 U.S. at 256-59, 278 n.18.

in the advertisement, sued the *Times*.<sup>170</sup> The Court overturned an Alabama jury's \$500,000 punitive damages award against the *Times*, squashed five similar pending lawsuits, and held that in libel cases involving public officials the plaintiff must prove "actual malice," or a knowing and reckless disregard for the truth.<sup>171</sup> The Court's holding removed the threat of financial ruin for one of America's most esteemed newspapers, and it ensured that other newspapers would not be subject to similar harms by erecting a number of procedural safeguards to prevent excessive punitive damages in libel cases. The lasting legacy of *Sullivan* is the transformation of libel law through the increased use of procedural safeguards to balance the protection from reputational harm and freedom of speech and press. Striking that balance often led to increased judicial control over the process.

*Sullivan*'s procedural balancing increased judicial control and severely limited the jury's traditional role as factfinder. The judge determines whether or not the plaintiff is a "public figure," and therefore must prove actual malice.<sup>172</sup> After determining whether the plaintiff is a public figure, a judge often grants summary judgment for the defendant by determining that there is no "clear and convincing evidence" of actual malice.<sup>173</sup> Even if the case goes to the jury, the plaintiff must prove actual malice with "convincing clarity."<sup>174</sup> Finally, an appellate court can conduct an "independent examination of [the] whole record" to determine whether actual malice's "convincing clarity" standard has been met.<sup>175</sup> In many respects, *Sullivan* eviscerated the jury's role as factfinder in public figure libel cases.<sup>176</sup>

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170. See *id.* at 278 n.18. They also sued King and other leaders of the Civil Rights Movement. See *id.* at 256.

171. *Id.* at 279-80.

172. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that public figures and officials must prove actual malice, but private individuals need only prove negligence); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (requiring proof of actual malice not only for public officials but for all public figures); *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966) (holding that the trial judge must determine if the plaintiff is a "public official").

173. Getting past the summary judgment stage is extremely difficult for most libel plaintiffs because they must be able to offer "clear and convincing evidence" of actual malice. See *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255-56 (1986). Since the Court's *Liberty Lobby* decision, libel defendants have prevailed in 77.9% of all summary judgment motions, according to the Libel Defense Resource Center (LDRC). See *Report on Summary Judgment* (LDRC Bulletin), Issue No. 3 1997; Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 90 (1985) (arguing for increased use of summary judgment in public-person libel cases).

174. *Sullivan*, 376 U.S. at 285-86.

175. *Id.*

176. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 540 (1991) ("[C]onstitutional protection of speech against the chilling effects of libel consists primarily of rules encouraging judges to decide factual matters that previously were left to juries."); Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761 (1986); Marc E. Sorini, Note, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 GEO. L. REV. 563 (1993).

The *Sullivan* Court's use of procedural safeguards to control punitive damages has been criticized by judges and scholars.<sup>177</sup> Because of this procedural balancing, public figure libel cases have become extremely complex for plaintiffs, defendants, judges, and especially juries. Conservative scholar Richard Epstein has written that the *Sullivan* Court's constitutionalization of libel law was unnecessary because the Court should have directly addressed the jury's awarding of general and punitive damages.<sup>178</sup> Indeed, several members of the Court have called for the outright elimination of punitive damages in libel cases.<sup>179</sup> Even Herbert Wechsler, who successfully argued *Sullivan* before the Supreme Court, expressed regret over his decision not to challenge the constitutionality of punitive and general damages.<sup>180</sup> The Court's lone attempt to deal directly with damages, *Gertz v. Robert Welch, Inc.*,<sup>181</sup> has been deemed a failure.<sup>182</sup> As a result of the Court's inability to limit excessive damages, *Sullivan* and its progeny have left libel plaintiffs—provided they overcome *Sullivan*'s procedural hurdles—with a lottery-like chance of a large financial windfall. The jury's power to award damages, however, has been checked in some of these cases because of procedural devices such as remittitur.

### B. *Curtis Publishing Co. v. Butts* and Remittitur in Post-*Sullivan* Cases

Even after *Sullivan*, judges continued to employ remittitur in libel suits against the press: beginning with *Curtis Publishing Co. v. Butts*.<sup>183</sup> Wally Butts, the University of Georgia's athletic director, sued the publisher of the

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177. See, e.g., Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988).

178. See Epstein, *supra* note 177, at 794 ("The Supreme Court with but little imagination could have struck down the entire verdict on the ground that Alabama clearly misapplied the law of general and punitive damages in the case.").

179. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 86 (1971) (Marshall, J., dissenting; Stewart, J., joining) (arguing that damages should be restricted to "actual losses"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 479 U.S. 749, 772 (1985) (White, J., concurring) (calling for the abandonment of *Sullivan* in favor of constitutional limits on punitive damages).

180. See LEWIS, *supra* note 165, at 223.

181. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). First, the *Gertz* Court tried to limit the recovery of compensatory damages by requiring private figures to prove "actual injury." *Id.* at 348-49. But actual injury was so broadly defined that it included almost any type of psychological harm. See *id.* at 349-50. Second, the *Gertz* Court tried to prevent juries from awarding punitive damages "in wholly unpredictable amounts" by requiring private figure plaintiffs to show knowing and reckless falsehood. *Id.* at 350.

182. See LEWIS, *supra* note 165, at 224 ("Judged by what has happened in the real world of libel. Justice Powell's attempt to impose limits has had no measurable effect: if anything the big verdicts grew bigger.").

183. *Curtis Publ'g v. Butts*, 388 U.S. 130 (1967).

*Saturday Evening Post* for printing an article accusing Butts and Alabama football coach Bear Bryant of conspiring to fix a football game between the two schools. A deeply divided Supreme Court, although it ruled in Butts's favor based on the facts, held that *Sullivan's* actual malice standard not only applied to public officials but also to people who qualified as "public figures."<sup>184</sup>

The Court's expansion of the *Sullivan* doctrine overshadowed how the Fifth Circuit used the *Butts* case to integrate remittitur into the *Sullivan* framework. At trial, Butts sued for \$5 million in compensatory damages and \$5 million in punitive damages. The jury awarded Butts \$60,000 in compensatory damages and \$3 million in punitive damages. The trial judge, however, reduced the punitive damages to \$460,000 by employing remittitur.<sup>185</sup> About six weeks later, the Supreme Court decided the *Sullivan* case. It was left to the Fifth Circuit to reconcile the trial judge's use of remittitur and the Supreme Court's constitutionalization of libel law.

A divided Fifth Circuit panel affirmed the trial judge's use of remittitur.<sup>186</sup> The majority gave several reasons for why the trial court acted within its authority. First, the trial judge determined that the jury had not acted out of passion or prejudice.<sup>187</sup> Second, remittitur is an accepted constitutional practice that "does not infringe upon the Seventh Amendment's guaranty of a jury trial."<sup>188</sup> Third, the trial judge accurately calculated the amount of damages by determining the maximum amount allowable under the law.<sup>189</sup> Finally, the panel rejected the alternative of a new trial as "really no solution" because once again the "jury would be pretty much on its own, under the unavoidably vague, elastic standards . . ."<sup>190</sup> The Fifth Circuit concluded that "the jury verdict, as reviewed and reduced by the trial judge, is the tort-feasor's assurance that such damages will not exceed that which the law would tolerate to achieve the Georgia objective of deterring repetition or

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184. *Id.* at 162 (Warren, C.J., concurring in the result).

185. *See id.* at 137-38.

186. *See Curtis Publ'g Co. v. Butts*, 351 F.2d 702, 720 (5th Cir. 1965). Judge Rives, who dissented, believed the trial judge should have granted a new trial because of the intervening *Sullivan* decision. *See id.* at 720 (Rives, J., dissenting). In dicta, Judge Rives also said that the use of remittitur "violates the defendant's rights under the seventh amendment." *Id.* at 729 (Rives, J., dissenting). Five years later, however, Judge Rives decided that remittitur does not violate the Seventh Amendment. *See Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1042-43 (5th Cir. 1970).

187. *See Butts*, 351 F.2d at 717.

188. *Id.* at 718-19. The Fifth Circuit also said: "The law recognizes that an award of any type of damages—compensatory or punitive—made by a jury free of bias, may be too small or too large. When that occurs—when the judge concludes that the law regards the verdict as too small or too large—then appropriate action must be taken by the court." *Id.* at 718.

189. *See id.* at 719. This is known as the maximum recovery rule. *See infra* Section II.C.

190. *Butts*, 351 F.2d at 719.

compensating wounded feelings."<sup>191</sup> In doing so, the Fifth Circuit provided an alternative method to the Supreme Court's procedural framework to protect media defendants from excessive damages.

A year before it decided *Butts*, the Supreme Court sanctioned the use of remittitur in a non-media but post-*Sullivan* libel case.<sup>192</sup> *Butts* is equally important, however, because the Court ultimately agreed with the Fifth Circuit that remittitur does not violate the Seventh Amendment, particularly when First Amendment rights of the press are at stake. The Court said:

We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, *manifested in this instance by the trial court's remittitur*, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted.<sup>193</sup>

Although the *Butts* Court is best known for extending *Sullivan*'s actual malice standard from public officials to public figures, its dicta about remittitur proved equally important because it softened the financial blow for losing media defendants such as Curtis Publishing. In future cases, remittitur would complement the *Sullivan* framework in preventing excessive punitive damages awards against the press.

### C. Remittitur in Modern Cases

#### 1. The Rules of Remittitur

The rules of remittitur are complicated because they differ among state courts, which are not bound by the Seventh Amendment,<sup>194</sup> and among the federal circuits. The losing defendant often initiates the use of remittitur by filing a motion for a new trial because of excessive damages. In addition, the trial judge can initiate the use of remittitur.<sup>195</sup> As a general rule, the trial judge must order a new trial and cannot employ remittitur if the award was a product of the jury's passion or prejudice, because the entire jury verdict has been

191. *Id.*

192. See *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 65-66 (1966) ("If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial. Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.").

193. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 160 (1967) (emphasis added).

194. See *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876).

195. See FED. R. CIV. P. 59(d).

tainted.<sup>196</sup> Both the defendant and the trial judge have ten days after the verdict is filed to request its use. The trial court's decision to employ remittitur is reviewed by appellate courts under an abuse of discretion standard.<sup>197</sup> Furthermore, appellate courts also may reduce the damage awards by using remittitur.<sup>198</sup>

To employ remittitur, the trial judge initially must determine whether the damages are excessive. The legal standard governing this question is extremely unclear. Many state and federal trial courts determine whether the amount "shocks the conscience" of the court.<sup>199</sup> The "shocks the conscience" standard, however, has been widely criticized because it is devoid of substantive content and affords judges too much discretion.<sup>200</sup> A much stricter standard, which involves a comparison with other damage awards, is whether the award "deviates materially from reasonable compensation."<sup>201</sup> The Supreme Court, in *Gasperini v. Center for Humanities, Inc.*, recently held that New York's codification of the "deviates materially" standard can apply in federal diversity cases only if the federal trial court applies the standard and the appellate court reviews it for an abuse of discretion.<sup>202</sup> The *Gasperini*

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196. See *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520 (1931).

197. See 11 WRIGHT ET AL., *supra* note 8, § 2820, at 213; *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996) (affirming that the abuse of discretion standard does not trample on the Seventh Amendment right to a jury trial).

198. See 11 WRIGHT ET AL., *supra* note 8, § 2820, at 216-18; Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 344-57 (surveying the increased use of remittitur by federal appellate courts).

199. See, e.g., 11 WRIGHT ET AL., *supra* note 8, § 2815, at 162-63 (finding remittitur "to be proper 'where no clear judicial error or pernicious influence can be identified, but where the verdict is so large as to shock the conscience of the court'") (quoting *Abrams v. Lightolier*, 841 F. Supp. 584, 593 (D.C. N.J. 1994)). Part of the problem is that the Federal Rules of Civil Procedure do not specify a standard for when a verdict is excessive. See FED. R. CIV. P. 59(a)(1) (permitting new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States").

200. See, e.g., 11 WRIGHT ET AL., *supra* note 8, § 2807, at 81-82 ("The phrase 'shocks the conscience of the court,' among others, is much used in the cases but adds very little by way of guidance."); *Gasperini*, 518 U.S. at 465-66 (Scalia, J., dissenting) ("[I]t is far from clear that the district-court standard ought to be 'shocks the conscience.'"). Justice Scalia suggested that the proper standard derives from Justice Story's opinion in *Blunt v. Little* that "if it should clearly appear that the jury . . . have given damages excessive in relation to the person or the injury." *Id.* at 466 n.11 (quoting *Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1,578)).

201. N.Y. C.P.L.R. § 5501(c) (McKinney 1995) (quoted in *Gasperini*, 518 U.S. at 418). As one commentator said: "[t]he 'deviates materially' standard, in design and operation, influences outcomes by tightening the range of tolerable awards." Richard D. Freer, *Some Thoughts on the State of Erie after Gasperini*, 76 TEX. L. REV. 1637, 1640 (1998). Other standards include whether the award was "clearly within the maximum limit of a reasonable range," "indisputably egregious," and "clearly outside the maximum limit of a reasonable range." *Gasperini*, 518 U.S. at 466 (Scalia, J., dissenting) (quoting *Ismail v. Cohen*, 899 F.2d 183, 186 (2d. Cir. 1990)); see also *Banff v. Express, Inc.*, 921 F. Supp. 1065, 1069 (S.D.N.Y. 1995); *Paper Corp. v. Schoeller Technical Papers, Inc.*, 807 F. Supp. 337, 350-51 (S.D.N.Y. 1992)).

202. See *Gasperini*, 518 U.S. at 419.

Court held that an appellate court's application of the "deviates materially" standard would violate the Seventh Amendment right to a jury trial. Although *Gasperini* involved compensatory damages, the implications of the Court's decision is that trial judges will continue to have wide latitude in reviewing excessive damages, ordering new trials, and employing remittitur.

A trial judge's decision to employ remittitur is followed by a determination of how much of the award the winning plaintiff must remit. Once again, the standard for determining the amount of a remittitur is extremely unclear. Judges have employed several competing theories to calculate the amount the winning plaintiff should receive after a remittitur: (1) the minimum amount the jury would have awarded; (2) the maximum amount the jury would have awarded; (3) the amount a reasonable jury would have awarded; and (4) whatever amount the judge thinks is proper. In most judicial opinions, the judge does not explain which theory he has adopted in calculating the remittitur.<sup>203</sup>

The winning plaintiff cannot appeal the amount of the damages received after accepting a remittitur because the plaintiff has a choice between accepting the remittitur and a new trial.<sup>204</sup> The plaintiff cannot claim that she accepted the remittitur "under protest."<sup>205</sup> The losing defendant, on the other hand, does not have a choice about accepting the remittitur and may file an appeal for a new trial or a larger remittitur.

## 2. Remittitur in Practice

There is no general pattern to when judges employ remittitur. Much like the "shocks the conscience" standard, judicial discretion often depends on the size of the award. According to a survey of 900 cases tried in Cook County, Illinois, and San Francisco County, California, by RAND's Institute for Civil Justice, judges reduced the damages by an average of 40% in cases with awards of \$1 million or more and by an average of 7% percent in cases with awards of less than \$100,000.<sup>206</sup> Punitive damages also are a frequent target of remittitur. A survey of products liability cases from 1983 to 1985 by the

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203. See 6A MOORE ET AL., *supra* note 156, at 59-190; *infra* Part II.D.3. Professor David Baldus's recent study suggests that judges could make better use of remittitur and apply it more consistently. See *infra* text accompanying note 282.

204. See *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977); *Woodworth v. Chesbrough*, 244 U.S. 79 (1917).

205. Cf. *Mixer*, *supra* note 7, at 1151 (advocating the use of remittitur "under protest" enables the plaintiff to appeal the decision to remit).

206. See Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 41 (citing MICHAEL G. SHANLEY & MARK A. PETERSON, *POSTTRIAL ADJUSTMENTS TO JURY AWARDS* (1987)).

Government Accounting Office "found post-trial reductions in 82% of the twenty-three punitive damages verdicts."<sup>207</sup> A commentator who has participated in and surveyed nine recent empirical studies concluded: "[e]very empirical study of punitive damages demonstrates that there is no nationwide punitive damages crisis. The research shows that punitive damages cluster in business tort and intentional tort cases, not personal injury. The increase in punitive damages is largely confined to a few jurisdictions."<sup>208</sup> Although most of the studies focus on products liability and medical malpractice cases, libel cases tell a similar story.

In recent years, juries have expressed the public's increasing hostility toward the press by awarding multimillion dollar punitive damages awards in libel suits.<sup>209</sup> Over the past fifteen years, however, judges have employed remittitur to reduce excessive damages in many high-profile libel cases.<sup>210</sup> The top ten largest libel verdicts have been either reduced, reversed, or settled.<sup>211</sup> According to studies by the Libel Defense Resource Center, about sixty to seventy percent of all libel verdicts are reduced or reversed, either at trial or on appeal.<sup>212</sup> Although this paper acknowledges that remittitur is not a utopian solution to the problem of excessive damages, it disputes the statement by a leading First Amendment scholar that remittitur is "almost

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207. *Id.* at 42.

208. *Id.* at 69.

209. A recent study of punitive damages in 45 of the nation's most populous counties found that juries frequently awarded punitive damages in intentional tort cases and in libel and slander cases. See Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 646 (1997). According to the Libel Defense Resource Center, 22 cases went to trial in 1997, the highest number since 1993. Libel defendants won in 50% of the cases, an all-time high. See John J. Walsh, *Damages: Will They Be Different in the Next Millennium?*, 523 P.L.J. 297, 300 (1998). When the media lost, however, they lost big—such as in the *Food Lion* and *Wall Street Journal* cases. See *infra* Parts II.D & II.E. The Libel Defense Resource Center found that punitive damages rose in 1996 compared to 1994 and 1995. Of the ten libel verdicts against the media in 1996, five included initial damage awards of \$2,380,000 or higher. The five large awards were all jury trials. The high-water mark for punitive damages was 1990 and 1991. See *Trail and Damage Awards* (LDRC Bulletin), 1997 No. 1.

210. See, e.g., *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. Ct. 1995) (affirming the appellate court's remittitur of \$10 million of a \$31.5 million punitive damages award in favor of a local prosecutor against the *Philadelphia Inquirer*); *Newton v. NBC*, 930 F.2d 662 (9th Cir. 1990) (reversing libel verdict in favor of entertainer Wayne Newton, which the trial court reduced through remittitur from \$19 million in compensatory and punitive damages to approximately \$5.3 million); *Burnett v. National Enquirer*, 144 Cal. Rptr. 206 (Cal. Ct. App. 1983) (affirming reduction of punitive damages from \$750,000 to \$150,000 for a tabloid article about entertainer Carol Burnett).

211. See Ron Nissimov, *Media Reaction Mixed on Journal Libel Verdict*, HOUS. CHRON., Mar. 21, 1997, at A33.

212. See LEWIS, *supra* note 165, at 220-21; Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1753 (1998); C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 260 & n.103 (1993).

always an insufficient response."<sup>213</sup> Remittitur is one of several remedies employed by judges in order to keep punitive damages in check.

Remittitur has become an even more viable remedy since the Supreme Court's 1996 decision in *BMW of North America, Inc. v. Gore*.<sup>214</sup> In that case, a new car buyer received a \$2 million punitive damages award (remitted from \$4 million) because the factory had repainted his car without telling him. The Court held for the first time that a punitive damages award was "grossly excessive" and violated the Fourteenth Amendment's Due Process Clause.<sup>215</sup> The Court based its decision on three factors: (1) "the degree of reprehensibility"; (2) "the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award"; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."<sup>216</sup> These factors have not provided lower courts with any clearly applicable guidelines for determining when punitive damages are excessive. But *BMW v. Gore* has made remittitur an even more attractive remedy.

Several studies of post-*BMW* punitive damages cases have found that trial and appellate courts are increasingly willing to employ remittitur. According to one study, federal courts of appeals have vacated or remitted eight of eleven punitive damages awards because of their excessiveness.<sup>217</sup> In another study of post-*BMW* federal cases, trial and appellate courts have reduced the punitive damages in fourteen of nineteen cases because of excessiveness.<sup>218</sup> Also, all five punitive damages cases in which the Supreme Court has granted certiorari have been reduced on remand.<sup>219</sup> The remainder of this paper will

213. Van Alstyne, *supra* note 161, at 808.

Professor Van Alstyne wrote:

Indeed, the chilling effect on publishers who have reason to be apprehensive of being caught by the jury, policed only by the discretion of judges to reduce damages in such measure as the judges then think appropriate, is still intolerable. For all that one can know, the judges may themselves still sustain very sizeable punitive damage awards reflecting in part their own understandable, but constitutionally improper, distaste for the defendant's publication.

*Id.* Professor Van Alstyne, however, underestimates the ability of both trial and appellate courts to use remittitur. This would prevent one local judge, who is just as biased against a media defendant as the jury, from allowing grossly excessive damages to stand. *See id.*

214. *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

215. *Id.* at 585-86.

216. *Id.* at 574-75.

217. *See* Rustad, *supra* note 206, at 40.

218. *See* Thomas B. Kelley & Steven D. Zansberg, *Punitive Damages in Media Tort Litigation*, 523 P.L.I./PAT. 359, 369-70 (1998) (citing Allen M. Mansfield & Elizabeth J. Arlio, *The Aftermath of BMW v. Gore—Who is Now the Trier of Fact?*, 990 P.L.I./CORP. 55 (1997)). Another study found that about half the cases applying *BMW* in year two resulted in reduced damages. *See* Samuel A. Thumma, *Punitives Kept Ebbling in Second Post- 'BMW' Year*, NAT'L L.J., July 20, 1998, at B8.

219. *See* Thomas B. Kelley & Steven D. Zansberg, *supra* note 218, at 370.

focus on the lawsuit between Food Lion and ABC—one of several large, post-*BMW* punitive damages verdicts against the press—and argues that *Food Lion* reflects the increasingly prominent role that remittitur will play in reducing excessive punitive damages against the press.

#### D. *Food Lion: A Case Study of Remittitur*

*Food Lion* shows how remittitur can be used in conjunction with the Court's holding in *BMW v. Gore* to reduce excessive punitive damages against the press in the twenty-first century. In addition to its continued use in libel cases, remittitur assumes even greater importance in tort cases against the press for its news gathering activities. These news gathering cases do not afford media defendants the procedural protections of *Sullivan*, thus media defendants must rely almost exclusively on the trial and appellate courts to control juries by employing other procedural safeguards such as remittitur.

##### 1. Background

In 1992, two ABC producers were hired as meat wrappers at different stores of the southeastern supermarket chain Food Lion by using bogus resumes, references, and addresses. Working for about two weeks, the two "employees" wore hidden cameras to expose unsanitary practices in the handling of meat and deli products. Based on this undercover reporting, ABC's Prime Time Live aired a special segment on Food Lion's unsanitary practices that included a shot of an employee using bleach to hide the smell of spoiled meat. Food Lion challenged the network's news gathering techniques by suing the producers and the network for fraud, trespass, and other common law torts.<sup>220</sup>

In December 1996, a North Carolina jury ruled in favor of Food Lion on four counts: fraud, trespass, breach of duty, and unfair trade practices.<sup>221</sup> United States District Court Judge N. Carlton Tilley, Jr. made a post-verdict effort to limit the jury's ability to award compensatory damages. Employing a proximate cause analysis, Judge Tilley ruled that Food Lion could not collect compensatory damages based on lost sales and profits because they "were not the natural and probable consequence" of the news gathering torts.<sup>222</sup> If the supermarket chain had wanted to recover lost sales and profits,

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220. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1224 (M.D.N.C. 1996) (mem. op.).

221. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.* 964 F. Supp. 956 (M.D.N.C. 1997).

222. *Id.* at 966.

Judge Tilley wrote, they should have challenged the validity of the story by suing for libel.<sup>223</sup>

Although the jury heeded Judge Tilley's advice by awarding Food Lion only \$1400 in compensatory damages, it awarded the supermarket chain \$5.5 million in punitive damages.<sup>224</sup> Behind the scenes, the jury was deeply divided, deliberating over damages for nearly six days. Nine jurors wanted little or no damages award. Three jurors wanted to punish ABC severely, with one juror holding out for a \$1 billion award. After an acrimonious debate that included references to God and the Bible, the jurors compromised at \$5.5 million.<sup>225</sup> The jury's message, as conveyed by jury foreman Gregory Mack, was that the press is not above the law: "[t]he media has the right to bring the news, but they have to watch what they do," Mack said. "It's like a football game. There are boundaries, and you have to make sure you don't go outside the boundaries."<sup>226</sup>

## 2. Reaction

Some commentators, however, believed that the jury was the party out of bounds.<sup>227</sup> The media's reaction was mixed—some members of the media overreacted with typical bluster that this is the end of the First Amendment as we know it,<sup>228</sup> some vigorously defended ABC,<sup>229</sup> while others, particularly some elite members of the print media, expressed outrage over the news gathering tactics of television news magazines such as Prime Time Live.<sup>230</sup>

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223. See *id.* at 959.

224. See Kurtz & Pressley, *supra* note 1, at A1. Food Lion sought between \$52 million and \$1.9 billion in punitive damages. See *id.*

225. For a terrific behind-the-scenes look at what happened in the jury room, see Justin Cantanoso, *From 0 to \$1 Billion: Food Lion/ABC Jury Started Very Far Apart*, GREENSBORO NEWS & REC., Jan. 23, 1997, at A1.

226. Kurtz & Pressley, *supra* note 1.

227. For the best scholarly analysis of *Food Lion*, see David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161 (1997). Logan, a Wake Forest University law professor, observed much of the *Food Lion* trial in nearby Greensboro, North Carolina. See *id.*

228. See, e.g., Zion, *supra* note 3; Scott Andron, *Food Lion versus ABC: Journalism World Trying to Sort Meaning of Messages from North Carolina Jury*, THE QUILL, Mar. 1997, Sec. 2:15 (commenting on the media's predictable outrage).

229. See, e.g., Abrams, *supra* note 3; Roone Arledge, *Hidden Cameras Find the Truth*, N.Y. TIMES, Feb. 1, 1997, at A19; James C. Goodale, *Killing the Messenger*, N.Y.L.J., Feb. 7, 1997, at 3.

230. See, e.g., Marvin Kalb, *Practicing Deception in the Pursuit of Truth*, WASH. POST, Mar. 24, 1997, at A19; A.M. Rosenthal, *Reporters with Masks*, N.Y. TIMES, Dec. 27, 1996, at A39; Jonathan Yardley, *The Food Lion Jurors' Reverberating Roar*, WASH. POST, Jan. 27, 1997, at C2. The use of hidden cameras by news magazines have been the target of a number of tort cases, but that is beyond the scope of this paper. See, e.g., Barry Meier & Bill Carter, *Undercover Tactics by TV Magazines Fall Under Attack*, N.Y. TIMES, Dec. 23, 1996, at A1.

For the purposes of this paper, the ethical debate over ABC's conduct with regard to Food Lion is relatively insignificant. What is significant is how most members of the media focused solely on the jury's initial verdict.<sup>231</sup> The subsequent reduction of the damages did not receive a comparable amount of media attention.<sup>232</sup> Thus, the media's skewed reporting ignored remittitur's effectiveness in protecting the freedom of the press.

### 3. The Judge's Decision to Employ Remittitur

In August 1997, Judge Tilley issued a memorandum opinion employing remittitur and reducing the punitive damages awarded to Food Lion by nearly 95 percent, from \$5.5 million to \$315,000.<sup>233</sup> The Supreme Court's 1996 decisions about punitive damages had a major impact on the judge's decision to employ remittitur. Judge Tilley prominently cited *BMW v. Gore*<sup>234</sup> and used the Court's three factors—the degree of reprehensibility, the disparity between the harm and size of the award (the ratio), and the difference between this award and comparable cases—to justify his decision.<sup>235</sup> He also interpreted the Court's decision in *Gasperini*<sup>236</sup> to require the application of the state common law on punitive damages to the case.<sup>237</sup> Since *BMW's* three factors were included among the factors considered by the state laws at issue, Judge Tilley focused almost exclusively on the degree of reprehensibility, ratio of damages to actual harm, and sanctions for comparable conduct.<sup>238</sup>

231. Only a few commentators recognized that the damages award would be reduced. See Marcia Coyle, 'BMW' Punies Ruling May Upend Food Lion Verdict, NAT'L L.J., Feb. 3, 1997, at A9; Dennis Hale, Food Lion Damages Won't Survive Appeals, EDITOR & PUBLISHER, Apr. 12, 1997, at 56 (correctly predicting, as it stands, that Food Lion "will be left with token damages that won't cover its attorneys fees").

232. See Logan, *supra* note 227, at 224-29 (discussing limits on punitive damages in libel suits, particularly remittitur). Logan conducted a Westlaw search that revealed 199 mentions of the \$5.5 million award, but only eighty-nine mentions of the remittitur. See *id.* at 224 n.411. Furthermore, the initial damages award often made the front page of many small and medium size papers, but the remittitur story was picked up off the wire and buried in their business sections. See *id.* But see Lawrie Mifflin, Judge Slashes \$5.5 Million Award to Grocery Chain for ABC Report, N.Y. TIMES, Aug. 30, 1997, at A1. As one punitive damages specialist said: "[m]edia accounts tend to report trial verdicts, but fail to note that post-trial reductions are quite common." Rustad, *supra* note 210, at 42. The same thing is true when the judge threw out all the remaining damages and ordered a new trial in the *Wall Street Journal* case. See, e.g., Paul M. Barrett, Libel Verdict Against Dow Jones to be Thrown Out, Says Judge, WALL ST. J., Apr. 9, 1999 at B6.

233. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 937-40 (M.D.N.C. 1997) (mem. op.).

234. See *supra* notes 218-223 and accompanying text.

235. See *Food Lion*, 984 F. Supp. at 933.

236. See *supra* notes 204-206 and accompanying text.

237. See *Food Lion*, 984 F. Supp. at 933.

238. See *id.* at 935-36. Both North Carolina and South Carolina law about punitive damages applied to the case because the undercover ABC producers worked in stores in those states. See *id.* at 927.

Relying on these factors, Judge Tilley determined that the punitive damages violated due process.<sup>239</sup> He decided to employ remittitur. He did not discuss his method of calculating the amount of excessiveness. In reducing the damages, he basically reviewed the degree of reprehensibility of each defendant and the ratio of punitive to compensatory damages.<sup>240</sup> Like most trial judges, Judge Tilley did not specify if he was using the maximum, minimum, or reasonable recovery rule. Nor did Judge Tilley attempt to justify remittitur's constitutionality in the context of the Seventh Amendment. He probably assumed, quite correctly, that the Court had recently affirmed remittitur's constitutionality in *Gasperini*.<sup>241</sup> Judge Tilley denied ABC's motions for a new trial, conditioned upon Food Lion's acceptance of remittitur.<sup>242</sup>

Food Lion grudgingly accepted the remittitur only to avoid a new trial.<sup>243</sup> In October 1999, the Fourth Circuit threw out the remaining \$315,000 in punitive damages.<sup>244</sup> The court affirmed the remaining damages award of two dollars.<sup>245</sup> The trial court's use of remittitur was not disturbed.<sup>246</sup> Food Lion filed a cross-appeal and in June 1998, the two sides argued the case before a three-judge panel. Although Food Lion is still trying to win its battle against ABC in the court of public opinion,<sup>247</sup> one of the case's lasting legacies may be its use of remittitur.

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929.

239. See *id.* at 939.

240. See *id.*

241. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996).

242. See *Food Lion*, 984 F. Supp. at 939.

243. Food Lion said in a prepared statement:

Food Lion's decision . . . is based solely upon its desire to avoid the time and expense of a new trial and should not be construed as an agreement with or consent to the court's conclusion that the jury's awards of punitive damages were unconstitutional or otherwise excessive. Indeed, Food Lion continues to believe that the jury's expression of outrage at ABC's illegal conduct, in the form of punitive damages awards was entirely appropriate.

Scott Andron, *Food Lion Accepts Reduced Verdict*, GREENSBORO NEWS & REC., Oct. 9, 1997, at A1.

244. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, Nos. 97-2492, 97-2564, 1999 WL 957738, at \*14 (4th Cir. Oct. 20, 1999).

245. See *id.*

246. See *id.* at \*2.

247. Particularly among the future members of the press. In July 1998, Food Lion mailed packages of materials containing a report titled "Fakes, Lies, and Videotape," a case study prepared by a journalism professor, and a 15 minute video prepared by a public relations firm, to over 200 journalism professors. See, e.g., Jacqueline Sharkey, *Taking the Fight to the Classroom*, AM. JOURNALISM. REV., Oct. 1998, at 13.

### E. The Implications of Food Lion

The use of remittitur in *Food Lion* is a lot like the use of remittitur in *Curtis Publishing Co. v. Butts*.<sup>248</sup> Just as the Fifth Circuit in *Butts* integrated remittitur into the Court's constitutional protection of libel defendants, Judge Tilley in *Food Lion* integrated remittitur into the Court's constitutional limits on punitive damages.<sup>249</sup> The *Food Lion* case reinforces why remittitur is such an attractive remedy for excessive damages against the press.

*Remittitur is efficient.* It addresses the problem of excessive damages directly, rather than putting both the plaintiff and defendant through a complex series of procedural hurdles like the *Sullivan* standard. Furthermore, it avoids the time and expense of a new trial and mitigates already exorbitant attorney's fees. Remittitur also avoids putting the case back in the hands of the jury. Libel cases are extremely fact-intensive, and the law is extremely complex. As a result, jurors often base their damages awards on a misunderstanding of the facts and the law.<sup>250</sup> Thus, remittitur reduces the number of errors and the endless cycle of appeals.

*Remittitur avoids issues of federalism.* Remittitur can be applied in either federal or state court because it is based on the common law. It was the perfect remedy in *Food Lion* because the plaintiff sued under state common law torts rather than *Sullivan's* constitutionalized libel procedures.<sup>251</sup> Judge Tilley's decision to rely on both state and federal law in determining whether the punitive damages were excessive did not prevent him from employing remittitur.

*Remittitur allows judges to decide cases without breaking new constitutional ground.* Judge Tilley rejected ABC's motion that the punitive damages awards against the press violated the First Amendment, avoiding the absolutist position of free press advocates.<sup>252</sup> On appeal, the Fourth Circuit did not allow ABC to cloak itself in the First Amendment in order to avoid generally applicable tort law.<sup>253</sup> The court, however, did not allow *Food Lion*

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248. See *supra* notes 182-192 and accompanying text. Like *Sullivan* and *Butts*, *BMW v. Gore* was decided in the middle of the *Food Lion* case on May 20, 1996. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

249. Observers praised Judge Tilley's conduct of the trial. See generally Scott Andron, *The Verdict: Tilley Did Well*, GREENSBORO NEWS & REC., Jan. 26, 1997.

250. See Steven Brill, 1982: *Behind the Verdict in the Washington Post Libel Trial*, AM. LAW., May 1994, at 31 (discussing how a jury awarded nearly \$2 million in compensatory and punitive damages—which were eventually overturned—based on one juror's misinterpretation of the law); Stuart Taylor, Jr., *Libel Law: A Tough Puzzle for Trial Jury*, N.Y. TIMES, May 5, 1983, at B15.

251. See Part II.D.1.

252. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 929 (M.D.N.C. 1997).

253. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, Nos. 97-2492, 97-2564, 1999 WL 957738.

to collect reputational damages outside of the *Sullivan* framework.<sup>254</sup> Remittitur allowed Judge Tilley to reduce the damages, but sidestep this constitutional quagmire.

*Remittitur does not eliminate the threat of punitive damages, which is a good thing.* The press should be held accountable for printing knowing and deliberate falsehoods, particularly against private citizens. In the news gathering context, punitive damages are necessary to remind members of the press that the First Amendment does not place them above the law.<sup>255</sup> Rejecting the notion that the First Amendment bars punitive damages against the press, Judge Tilley wrote: "Despite the many protections necessary for the proper operation of the press, it would be a peculiar rule indeed which immunized illegal activity, undertaken with a consciousness of wrongdoing, from punishment and deterrence through punitive damages."<sup>256</sup> Unlike a ban or cap on damages in libel cases, remittitur allows plaintiffs who are actually harmed by the media to recover damages. It prevents the media from being totally unaccountable and above the law.

The main function of remittitur is to prevent extremely excessive damage awards, termed outliers. Large initial punitive damages, however, seem to be the only way to get the press's attention. For example, in a 1994 hidden camera case against ABC's *Prime Time Live*, a Virginia jury awarded the plaintiff only \$1 in damages and attached a note to the verdict: "Take another look at *Prime Time's* goals and objectives. Be sure that the kind of reporting coming from this show is what you, as an outstanding news organization, want to put your name to."<sup>257</sup> Neither ABC, nor the rest of the media, heeded this warning. In balancing protection from reputational harm and the freedom of the press, some form of punitive damages, limited by the power of remittitur, is a necessary evil.

Remittitur, however, does not completely protect media defendants from the chilling effects of enormous damages. Devoid of constitutional protection and other procedural devices, remittitur is an inadequate remedy because:

*Remittitur often fails to reduce excessive compensatory damages.* National attention has focused on the problem of punitive damages, but compensatory damages are often just as excessive and capable of stifling the freedom of the press. Every major empirical study of punitive damages has

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at \*12-14 (4th Cir. Oct. 20, 1999).

254. See *id.* at \*14-\*16.

255. The Supreme Court has explicitly said that the press cannot disobey the law in order to pursue a story. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991); Randall P. Bezanson, *Means and Ends in Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998).

256. *Food Lion*, 984 F. Supp. at 932.

257. Marc Gunther, *The Lion's Share*, AM. JOURNALISM REV., Mar. 1, 1997, at 18.

found that trial and appellate judges more strictly review punitive damages than compensatory damages. One recent commentator, evaluating nine comprehensive empirical studies of punitive damages, said: "Punitive damages are far more likely to be reversed or remitted than compensatory damages."<sup>258</sup> According to one study that focused on medical malpractice cases, punitive damages were more likely to be reversed or remitted than compensatory damages.<sup>259</sup> This is also true in the libel context, as *Wall Street Journal*, the other large post-*BMW* damages case against the press, indicates.

In 1997, a Texas jury awarded the MMAR Group, a local securities firm, \$222.7 million—the largest damages award in the history of American libel law—because a *Wall Street Journal* story had accused the firm of shady deals that included bilking the Louisiana Pension Fund. The jury award consisted of \$200 million in punitive damages and \$22.7 in compensatory damages.<sup>260</sup> The federal trial judge, Ewing Werlein, Jr., immediately threw out the \$200 million in punitive damages against the Dow Jones Company, which owns the *Wall Street Journal*, because there was no clear and convincing evidence that the paper had acted with actual malice.<sup>261</sup> Judge Werlein also applied the three factors of *BMW v. Gore* and found that, even if the verdict is not excessive as a matter of law, the punitive damages were "clearly and grossly excessive."<sup>262</sup>

Initially, the \$22.7 million in compensatory damages remained. Judge Werlein reasoned that the newspaper story could have proximately caused the closing of the securities firm, and the damages were "within the range of testimony at trial and [were] supported by legally sufficient evidence."<sup>263</sup> In April 1999, however, Judge Werlein ordered a new trial and threw out all of the compensatory damages because MMAR had withheld evidence critical to the *Wall Street Journal's* case.<sup>264</sup>

The resolution of the *Wall Street Journal's* case does not diminish the threat of compensatory damages, which in many ways are a bigger problem for media defendants than punitive damages. Although one commentator has suggested that "[p]unitive damages are virtually the last weapon left to the

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258. Rustad, *supra* note 206, at 40.

259. *See id.* at 43.

260. For an account of how the *Wall Street Journal* jury reached its decision, see Susan Beck, *Trial and Errors*, AM. LAW. 43, June 1997.

261. *See* MMAR Group, Inc. v. Dow Jones & Co., Inc., 987 F. Supp. 535, 542-49 (S.D. Tex. 1997). Judge Werlein, however, upheld a \$20,000 punitive damages award against the reporter. *See id.* at 544-45.

262. *Id.* at 549. At the time, Judge Werlein indicated that he would have ordered MMAR to remit \$155 million if the Fifth Circuit had reinstated the punitive damages, leaving twice the compensatory damages. *See id.* at 550.

263. *Id.* at 541-42.

264. *See* MMAR Group, Inc. v. Dow Jones & Co., Inc., 187 F.R.D. 282, 292 (S.D. Tex. 1999).

libel plaintiff,"<sup>265</sup> this does not appear to be the case in a post-*BMW v. Gore* world. At least one plaintiff's attorney has suggested changing the focus from punitive to compensatory damages:

I view the interest of the libeled plaintiff in obtaining vindication accompanied by an appropriate level of compensatory damages as the primary end of a libel action. Too much success on a punitive damages claim has, I think, been the ruin of many a good defamation action, leading to overly-critical "independent review" of the trial evidence in the courts, and a "we can't possibly talk settlement" attitude in the councils of media defendants.<sup>266</sup>

Punitive and compensatory damages, however, are inextricably linked. A recent study of punitive damages found a "strong and statistically significant correlation between compensatory and punitive damages."<sup>267</sup> It is possible that if punitive damages keep getting thrown out, juries will catch on and award large compensatory damages awards instead.

There are three potential responses to the trend of large compensatory damages. First, remittitur can be used to reduce compensatory damages, both at the trial and the appellate level. Second, trial judges should employ a more rigorous proximate cause analysis in order to establish a link between the journalism story and the actual harm. For example, in *Food Lion*, Judge Tilley did not have to use remittitur to reduce the compensatory damages because his proximate cause analysis had already limited the jury's compensatory damage award to \$1400.<sup>268</sup> Finally, if the compensatory and punitive damages are both excessive, then the trial judge should order a new trial as in the *Wall Street Journal* case. Other courts have recognized the link between excessive punitive and compensatory damages and ordered new trials.<sup>269</sup>

There are a few other valid complaints about remittitur:

*Remittitur does not prevent the threat of large damages awards from intimidating many small news organizations (and even some larger ones).* Many small news organizations do not have libel insurance and can be put out of business by one large damages award.<sup>270</sup> Even large news organizations

265. See Barron, *supra* note 161, at 112.

266. Walsh, *supra* note 209, at 301.

267. Eisenberg, *supra* note 209, at 623.

268. See *supra* notes 222-224 and accompanying text.

269. See Kelly & Zansberg, *supra* note 218, at 450.

270. See LEWIS, *supra* note 165, at 202-03; THOMAS LITTLEWOOD, COALS OF FIRE: THE ALTON TELEGRAPH LIBEL CASE (1988) (chronicling how a \$9.2 million libel award forced a small newspaper to file for bankruptcy, settle for \$1.2 million, and subsequently curtail its investigative reporting); Doreen Carvajal, *Defamation Suit Leaves Small Publisher Near Extinction*, N.Y. TIMES, Oct. 8, 1997, at D1

can be intimidated. In 1998, the Gannett-owned *Cincinnati Enquirer* published an eighteen page story accusing Chiquita Brands International, Inc. of numerous illegal acts including bribing Colombian officials and using illegal pesticides.<sup>271</sup> Though the story was probably true, the *Enquirer* refused to defend it because its reporter allegedly obtained some of the information by hacking into the Chiquita's voice mail system.<sup>272</sup> Although no lawsuit had been filed against the newspaper, the *Enquirer* retracted the story in its entirety and paid Chiquita Brands a \$10 million settlement fee.<sup>273</sup>

*Remittitur does not reduce legal fees.* Exorbitant legal fees can have more of a chilling effect than a damages award. Legal fees, which in high-profile cases often exceed \$1 million, comprise "about eighty percent of the total cost of libel suits against the press."<sup>274</sup> In the *Wall Street Journal* case, Dow Jones is attempting to recover \$3.5 million in attorney's fees that it spent during the first trial against MMAR (which withheld critical evidence).<sup>275</sup>

*Remittitur is a post-hoc remedy.* It cannot prevent the chilling effect of the shock of a libel suit, or an initially large verdict.<sup>276</sup> And even if remittitur is employed, such as in the *Food Lion* case, it seems to leave neither side particularly happy. Both sides have issues they want to appeal.

In sum, remittitur is not a perfect antidote to the chilling effect of excessive libel damages on the media. Viewed in conjunction with the *Sullivan* doctrinal framework, however, remittitur can compensate for some of *Sullivan*'s shortcomings by directly limiting the power of juries to award excessive damages. As the *Food Lion* case indicates, in a world of excessive damages defined by the Supreme Court's decision in *BMW v. Gore*, remittitur will play a prominent role.

Remittitur can help strike the proper balance between protecting the press and protecting the reputations of defamed plaintiffs, between the power of the judge as the interpreter of the law, and the power of the jury as the trier of fact. Remittitur has evolved along with the constitutional protection of media defendants. *Butts* integrated remittitur into *Sullivan*'s actual malice framework, providing the judge with another procedural weapon to limit the jury's role as factfinder. As *Food Lion* illustrates, remittitur is particularly

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(discussing \$3 million damages award against publisher without libel insurance or the money to appeal).

271. See Gallagher & McWhirter, *supra* note 4.

272. See *An Apology to Chiquita: Enquirer: Voicemail Tapes Were Taken Illegally*, *supra* note 4.

273. See *id.* See Goodale, *supra* note 4, at 3 ("Hacking into voice-mail is the cyberspace equivalent of trespassing and, standing by itself, is not worth a payment of \$10 million. It is only the publication of the Chiquita story that raises the ante.")

274. Anderson, *supra* note 176, at 515-16.

275. See Lucia Moscs, *D.J. Seeks \$3.5 M for its Legal Fees*, EDITOR & PUBLISHER, Aug. 7, 1999, at 8.

276. See Anderson, *supra* note 176, at 515 ("[L]arge verdicts exact a financial penalty even when they are later reversed. . . . [E]ven a remote possibility of suffering a catastrophic loss is sobering.")

valuable in the absence of *Sullivan's* procedural protections. News-gathering torts, the latest way around *Sullivan*, will not result in enormous damages if the trial or appellate court employs remittitur. *Food Lion* also reveals that remittitur can be used in conjunction with the Court's latest attempt to limit punitive damages in *BMW v. Gore*. Judge Tilley's memorandum opinion provides terrific insight on how a future generation of trial judges can use remittitur in cases involving the press. In a way, remittitur is the safety valve in the Court's constitutional protection of the press from excessive damages.

### III. THE FUTURE OF REMITTITUR

If remittitur is going to play a prominent role in twenty-first-century efforts to curb excessive damages, then it is time for the courts to adopt and develop more consistent standards. This paper recommends four changes in the current legal framework.

First, the decision to employ remittitur should be a more comparative standard. The "shocks the conscience" standard should be officially discarded in favor of the "deviates materially" standard. Under the "deviates materially" standard, the trial judge would look at other similar cases and determine whether the award "deviates materially from what would be reasonable compensation."<sup>277</sup> Professor David Baldus has developed a system of comparative additur/remittitur review in a recent study of child injury and medical malpractice cases. The Baldus study suggests that remittitur is not being used frequently or effectively enough and that "comparative additur/remittitur review has the potential to control excessive and inadequate general and punitive damages awards and to maintain a reasonable level of consistency among awards in similar cases."<sup>278</sup> By allowing judges to compare damages awards, the "deviates materially" standard will enable judges to have more control over the process. As one commentator said: "[T]he 'deviates materially' standard, 'in design and operation, influences outcomes by tightening the range of tolerable awards.'"<sup>279</sup> If judges adopted the "deviates materially" standard, remittitur could serve its principal role of eliminating outliers.

Second, judges must be more explicit in determining how much of a damages award is excessive. In particular, they ought to specify whether they are using the maximum recovery rule, the minimum recovery rule, or what a

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277. N.Y. C.P.L.R. § 5501(c) (McKinney 1995) (quoted in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 418 (1996)).

278. Baldus, *supra* note 7, at 1188.

279. Richard D. Freer, *Some Thoughts on the State of Erie after Gasperini*, 76 TEX. L. REV. 1637, 1640 (1998).

reasonable jury would have awarded. This paper advocates the maximum recovery rule because it preserves the basis of a Seventh Amendment right to a jury trial and mirrors the Court's constitutional justifications for remittitur in *Dimick v. Schiedt*.<sup>280</sup> Although it will not be easy to determine what the maximum recovery should be, judges at least will be articulating how they have arrived at a particular amount. *Food Lion* was just one of many examples in which the judge determined the amount to be remitted in a seemingly arbitrary way. Any standard is better than none at all.

Third, judges should give better instructions to juries about when to award compensatory and punitive damages and how to calculate the damages. For example, judges should give explicit and detailed instructions about proximate cause so juries can be more precise in awarding compensatory damages. In this respect, the courts should borrow from contract law and use the common law to develop better standards. Although the damages are more easily calculable in contracts cases than in tort cases, juries are often confused by the time they get to the damages phase of a tort case. As the deliberations over the *Food Lion* award indicates, juries are often in need of more specific instructions.<sup>281</sup>

Finally, judges should be more aggressive in scaling back compensatory damages. The emphasis on the so-called punitive damages crisis could lead to a potential crisis over compensatory damages. To prevent this from happening, judges can do three things: (1) conduct their own proximate cause analysis (in addition to better jury instructions) and use this analysis to correct the jury's compensatory damages award; (2) employ remittitur more often to scale back compensatory damages; (3) order a new trial at the slightest inkling that either the compensatory or the punitive damages is excessive, or if the verdict was a product of passion or prejudice. Both remittitur and new trial should be given serious consideration if compensatory damages are going to be kept in line.

#### IV. CONCLUSION

Remittitur is somewhat of a forgotten remedy. Over the last 175 years, it has played an influential role in American law in the struggle between judges and juries to control the awarding of damages. Part I traced remittitur's ascent in American law and sought to explain why judges were reluctant to employ remittitur in libel and defamation cases involving the press. As a practical matter, nineteenth-century judges employed remittitur in contract and

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280. See *supra* text accompanying note 136.

281. See *supra* text accompanying note 226.

tort cases with easily calculable damages, but not in personal tort or libel cases. Professor Horwitz said judges were more likely to interfere in tort cases in order to protect commercial interests. An implication of Horwitz' thesis is that newspapers were not protected from excessive damages during the nineteenth century because they did not develop into commercial interests until the end of the century. Renee Lettow suggested that judges more closely guarded the reputations of public figures. This paper, however, seizes on a different strand of legal history—how the rise in personal injury lawsuits at the turn of the century led to the expanded use of remittitur. Judges feared that populist juries would assess enormous damages against deep pocket corporations, and thus began employing remittitur in all types of cases, including those involving the media. This thesis about the rise of personal injury lawsuits had important implications for the modern practice of remittitur, which is most often studied in conjunction with products liability and medical malpractice cases.

Part II concludes that, since *New York Times v. Sullivan* constitutionalized libel law, remittitur has developed into an integral part of the media's protection against excessive damage awards. *Curtis v. Butts* incorporated remittitur into *Sullivan's* procedural protections in public person libel cases. *Food Lion* reflects the increasing willingness of judges to employ remittitur in light of *BMW v. Gore's* constitutional protection against excessive punitive damages.

Today, tort cases involving the press are much different than they were in the nineteenth century. Recent cases, such as *Food Lion* and *Wall Street Journal*, often pit a large corporate plaintiff against another large corporate defendant. From a Horwitzian perspective, a nineteenth-century judge would not know which side to protect. As *Food Lion* illustrates, however, remittitur and other procedural devices allow judges to tip the scales heavily in favor of media defendants. There is no punitive damages crisis. In fact, compensatory damages may pose more of a long-term threat than punitive damages. The cries of the mass media that the punitive damages award in *Food Lion* is another near-fatal blow to the freedom of the press ignores the procedural protection that the media can receive from excessive damages through remittitur.

